2024: Department of Labor: Employee or Independent Contractor Classification under the Fair Labor Standards Act

effective on March 11, 2024.

https://www.federalregister.gov/documents/2024/01/10/2024-00067/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act

INTRO

- The Fair Labor Standard Act (FLSA Act) has been updated with an analysis that is more consistent with judicial precedent and the Act's text and purpose to better delineate the employee vs. Independent Contractor Classification.
- For more information contact:

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telephone: (202) 693–0406 (this is not a toll-free number)

Alternative formats are available upon request by calling 1– 866–487–9243.
If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest WHD district office. Locate the nearest office by calling WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or logging onto WHD's website for a nationwide listing of WHD district and area offices at www.dol.gov/whd/america2.htm

Who is expected to read this rule?

HR Officers responsible for Compensation and Benefits

Job Analyst Specialists

Independent Contractors

Executive Summary

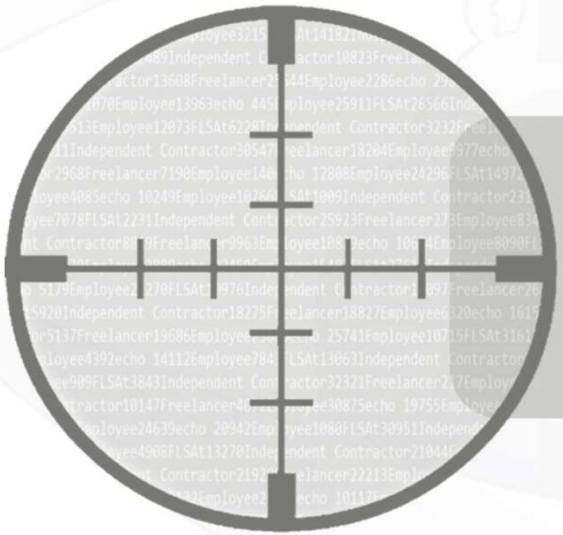
- This final rule addresses how to determine whether a worker is properly classified as an employee or independent contractor under the Fair Labor Standards Act (FLSA Act).
- Congress enacted FLSA in 1938 to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers. ***[(1) 29 U.S.C. 202]***
- The FLSA generally requires covered employers to pay nonexempt employees at least the Federal minimum wage for all hours worked and at least one and one-half times the employee's regular rate of pay for every hour worked over 40 in a workweek.
- The Act also requires covered employers to maintain certain records regarding employees and prohibits retaliation against employees who are discharged or discriminated against after, for example, filing a complaint regarding their pay.

Background

The FLSA was enacted in 1938 in order to protect employees. It addresses the following items …

1. Requires that covered employers pay nonexempt employees at least the Federal minimum wage [presently $7.25 per hour] for every hour worked.
2. Requires that any hours worked beyond 40 in a workweek are compensated at least one and one-half times the employee's regular rate of pay.
3. Regulates the employment of children.
4. Prohibits employers from keeping employee tips.
5. Requires employers to provide reasonable break time and a place for covered nursing employees to express breast milk at work.
6. Requires covered employers to "make, keep, and preserve" certain records regarding employees and prohibits retaliation against employees who engaged in protected activity, such as filing a complaint regarding their pay.

SCOPE

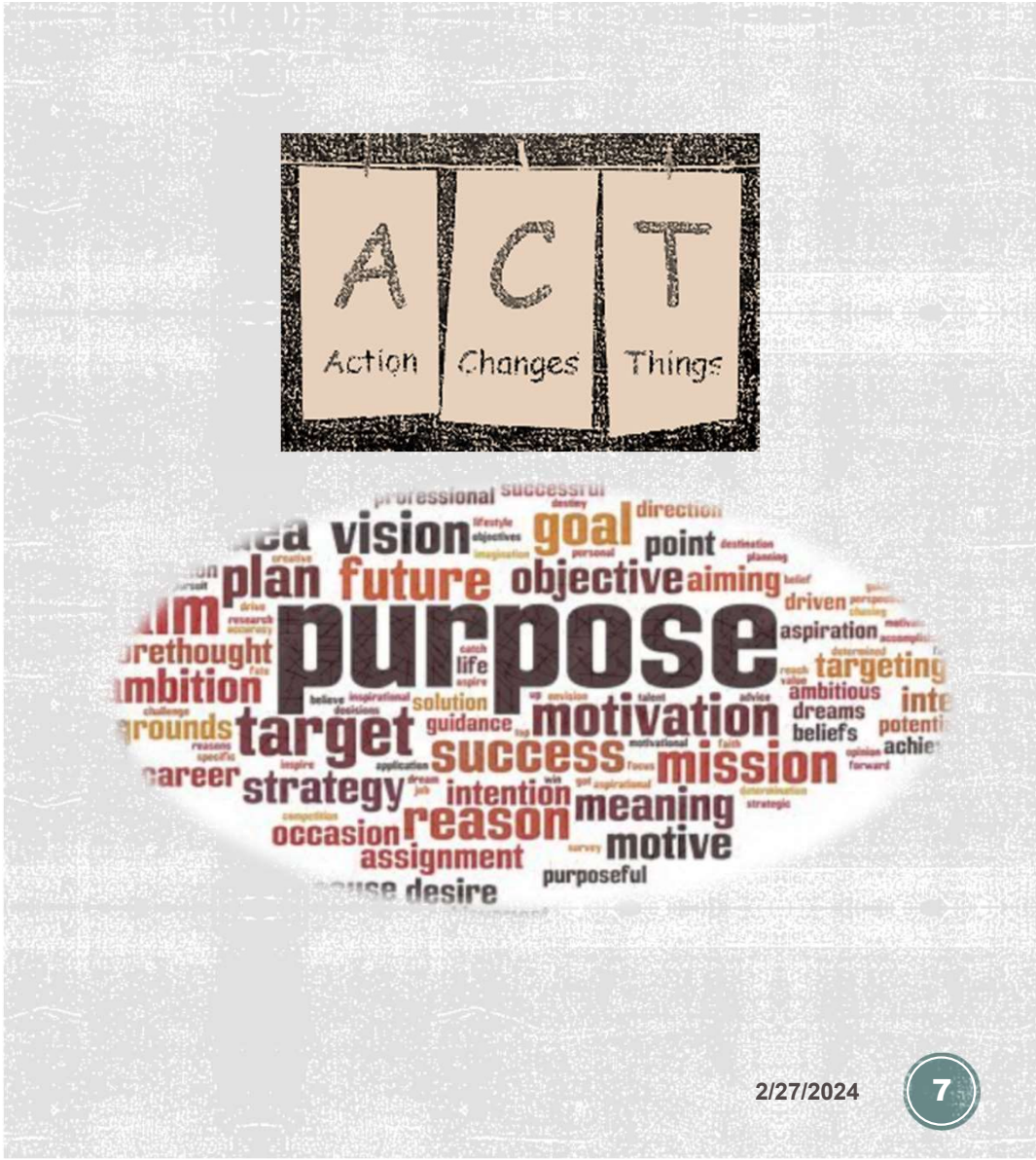


The scope of this regulation is limited to providing guidance regarding employee or independent contractor classification under the FLSA as currently enacted.

PURPOSE OF THE ACT

- The Department explained in its 1947 brief before the Supreme Court in Rutherford that the Act *"contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to the Act were not deemed to fall within an employer-employee category."* [1]
- The Department continue stating that *the purposes of this Act required a practical, realistic, construction of the employment relationship … and the broad language of the statutory definitions is more than adequate to support such a construction.* [(220) Id. at *10–11]
- The determination of whether a worker is covered under the FLSA must be made in the context of the Act's own definitions and the courts' expansive reading of its scope.

1. (219) Brief for the Administrator at 10, Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) (No. 562), 1947 WL 43939, at *10 (quoting Portland Terminal, 330 U.S. at 150–51)]



What's the ULTIMATE QUESTION?

The ULTIMATE question FLSA guidance is meant to address is ….

whether as matter of economic reality the worker is in

- **business for themself or**
- **is economically dependent**

Are the examples provided in the final rule indicative of the final outcome?

The examples are intended to be aids to apply the discussion of each proposed factor.

The examples are not designed to illustrate the application of the full totality-of-the-circumstances test.

The Department's intent is to provide a comparison meant to highlight the "common-sense approach" many courts have taken when evaluating the various factors.

The Department mentions various industries or occupations in the examples to provide recognizable context for the reader; the examples do not provide the Department's definitive view on the ultimate outcome of the totality-of-the-circumstances analysis.

- [Incorporating additional examples] could leave the impression that the proper classification of workers rests on one or a handful of factors.
- To the contrary, the Department believes the current examples' focus on illustrating the basic analysis under a single factor and noting that the results indicate potential classification under each factor, but not the ultimate result, provides more useful guidance for this rule.

Is the Department adding additional examples based on specific industries?

The examples provided under this guidance are meant to serve as an illustration on how the factors may be applied during the analysis process. They are NOT MEANT to be used as a definite example.

The ultimate classification MUST be determined on the overall examination of EVERY Factor impacting the facts of each unique situation and industry.

Adding additional examples could leave the impression that the proper classification of workers rests on one or a handful of factors.

The current examples' focus on illustrating the basic analysis under a single factor and noting that the results indicate potential classification under each factor, but not the ultimate result, based on the guidance for this rule.

How are FACTORS to be addressed under this new rule?

1. No single factor or subset of factors is dispositive.
2. The final outcome is based on the totality-of-the-circumstances approach.
3. The weight to give each factor depends on the facts and circumstances of the particular case.
4. The outcome varies per industry, and therefore examining ALL factors is essential.
5. xx.
6. xxx

Independent Contractor vs. Employee

How should you be classified?

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Who is considered an Independent Contractor?

- Under this Act, the term *"Independent Contractor"* refers to workers who, as a matter of economic reality, are not economically dependent on an employer for work and are in business for themselves.
- The FLSA DOES NOT define the term "independent contractor." While it is clear that section 3(g)'s *"suffer or permit"* language contemplates a broader coverage of workers compared to what exists under the common law, "there is in the FLSA no definition that solves problems as to the limits of the employer-employees relationship under the Act.
- Independent Contractors are often referred to by different names such as … self-employed and freelancer. This rule IS NOT intended to disrupt the businesses of independent contractors who are, as a matter of economic reality, in business for themselves.
- The FLSA's protections *DO NOT APPLY TO INDEPENDENT CONTRACTORS*.
- The FLSA DOES NOT require covered employers to pay an independent contractor the minimum wage or overtime pay under sections 6(a) and 7(a) of the Act, or to keep records regarding an independent contractor's work under section 11(c). However, merely "putting on an 'independent contractor' label does not take [a] worker from the protection of the FLSA."

How is “Employer”, “Employee” and “Employ” defined under the Act?

The Act leverages the definition noted under *29 U.S.C. § 203 – Definitions* which defined the terms as …

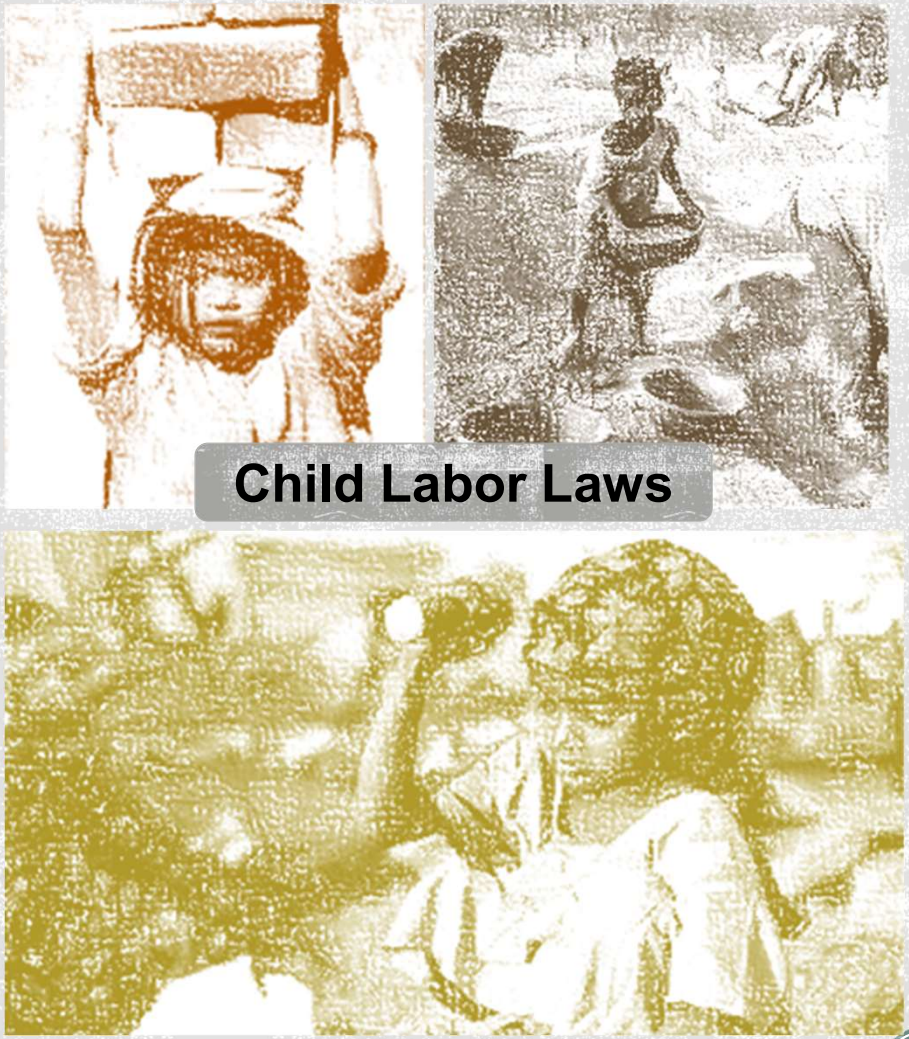
- 203(d) *“Employer”* includes *any person acting directly in the interest of an employer in relation to an employee and includes a public agency but DOES not include any labor organization* (other than when acting as an employer) *or anyone acting in the capacity of officer or agent of such labor organization*.
- 203(e)(1) Except as provided in paragraphs (2)(3), AND (4), the term “employee” means *any individual employed by an employer.*
- 203(g) “Employ” *includes to suffer* or permit to work.

Source: https://www.law.cornell.edu/uscode/text/29/203

WERE DID THE PHRASE *"SUFFER OR PERMIT"* DERIVES FROM AND WHAT IT MEANS?

- The phrase *"suffer or permit"* was commonly used in state laws regulating child labor prior to FLSA's enactment.
- As explained by the *Eleventh Circuit Court* in *Antenor v. D & S Farms*, *"[t]he 'suffer or permit to work' standard derives from state child-labor laws designed to reach businesses that used middlemen to illegally hire and supervise children." [5 88 F.3d 925, 929 n.5 (11th Cir. 1996)]*
- The standard was designed to ensure that an employer could be covered under the labor law even if they did not directly control a worker or used an agent to supervise the worker.
- The Supreme Court has explicitly and repeatedly recognized that this "suffer or permit" language demonstrates Congress's intent for the FLSA to apply broadly and more inclusively than the common law standard. [1]

1. See, e.g., **Darden, 503 U.S. at 326** (noting that "employ" is defined with "striking breadth" (citing **Rutherford, 331 U.S. at 728**)); **Rosenwasser, 323 U.S. at 362** ("A broader or more comprehensive coverage of employees . . . would be difficult to frame."); **Robicheaux v. Radcliff Material, Inc., 697 F.2d 662, 665 (5th Cir. 1983)** ("The term 'employee' is thus used 'in the broadest sense 'ever . . . included in any act." " (quoting Donovan v. Am. Airlines, Inc., 686 F.2d 267, 271 (5th Cir. 1982)))]



What does FLSA's "employee" definition encompasses?

The FLSA's "particularly broad" definition of "employee" ***encompasses all workers who are, "as a matter of economic reality, … economically dependent upon the alleged employer.*** [1]

1. (222) See **2Cornerstone Am., 545 F.3d at 343** (citing **Darden**, **503 U.S. at 326; Herman v. Express Sixty-Minutes Delivery Serv., Inc., 161 F.3d 299, 303 (5th Cir. 1998))]**

The Supreme Court agreed, reiterating the breadth and reach of the Act's definitions to work relationships that were not previously considered to constitute employment relationships and emphasizing that the determination *of an employment relationship under the FLSA depends not on "isolated factors but rather upon the circumstances of the whole activity*." ***[(223) See Rutherford, 331 U.S. at 728–30]***

What was Congress Intent for the Act?

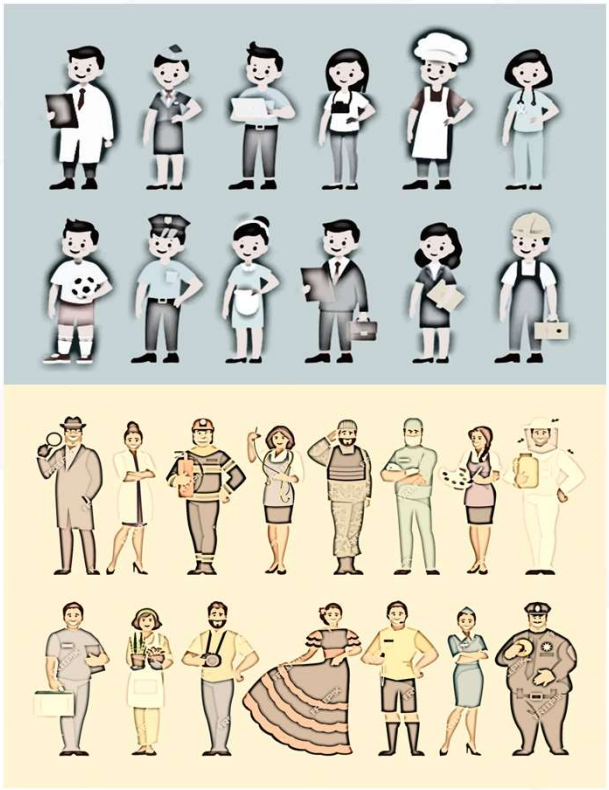
It was Congress's clear intent in fashioning the Act *(which has been repeated by courts for decades)* that the statutory language sweep broader than the common law and encompass all workers who are ***"suffered or permitted"*** to work, and the test for employment must reflect that plain language and clear intent. The Department's analysis does not place a "thumb on the scale" for employment, it has always been Congress clear intent as noted.

How does the definition impact Independent Contractors?

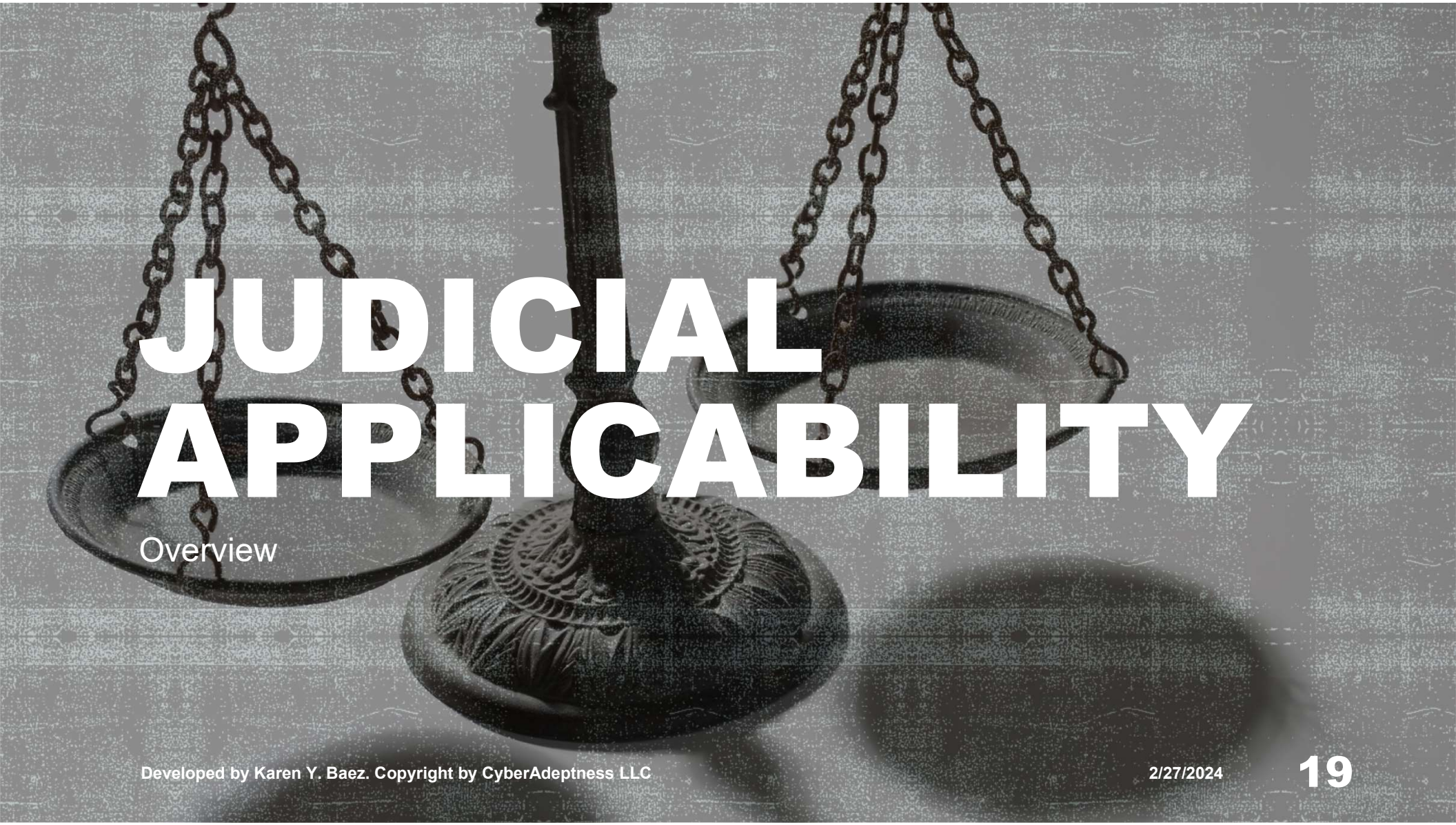
The Department emphasizes that there is a wide assortment of bona fide independent contractors across industries and occupations, and it believes that the regulations as finalized in this rule allow for this range of work relationships- from employees to independent contractors – to be appropriately classified.

The Department believes that an analysis that has been applied for decades and is aligned with the breadth of the relevant statutory definitions and binding judicial precedent is not only more faithful to the Act but also more familiar to the regulated community, workers, and those enforcing the Act.

Why are industry-specific or occupation-wide exemptions or carve-outs not included?



- The Department intends these regulations to apply to a broad range of work relationships and will continue to assess the need for more specific sub-regulatory guidance.
- The Department is providing its most detailed guidance to date regarding the application of each of the considerations identified by the Supreme Court as being important to the determination of whether a worker is an employee under the Act.
- While businesses are certainly and unequivocally able to organize their businesses as they prefer consistent with applicable laws, and workers are free to choose which work opportunities are most attractive to them, if a worker is an employee under the FLSA, then those FLSA-protected rights cannot be waived by either party.



JUDICIAL APPLICABILITY

Overview

How have the courts dealt with the issue?

Since the 1940's the courts have applied an economic reality test to determine whether a worker is an employee or an independent contractor under FLSA.

The ultimate inquiry is ***whether, as a matter of economic reality, the worker is economically dependent on the employer for work (and is thus an employee) or is in business for themselves (and is thus an independent contractor).***
In assessing economic dependence, courts have historically conducted a totality of the circumstances analysis, considering multiple factors to determine whether a worker is an employee or an independent contractor, with no factor or factors having predetermined weight.

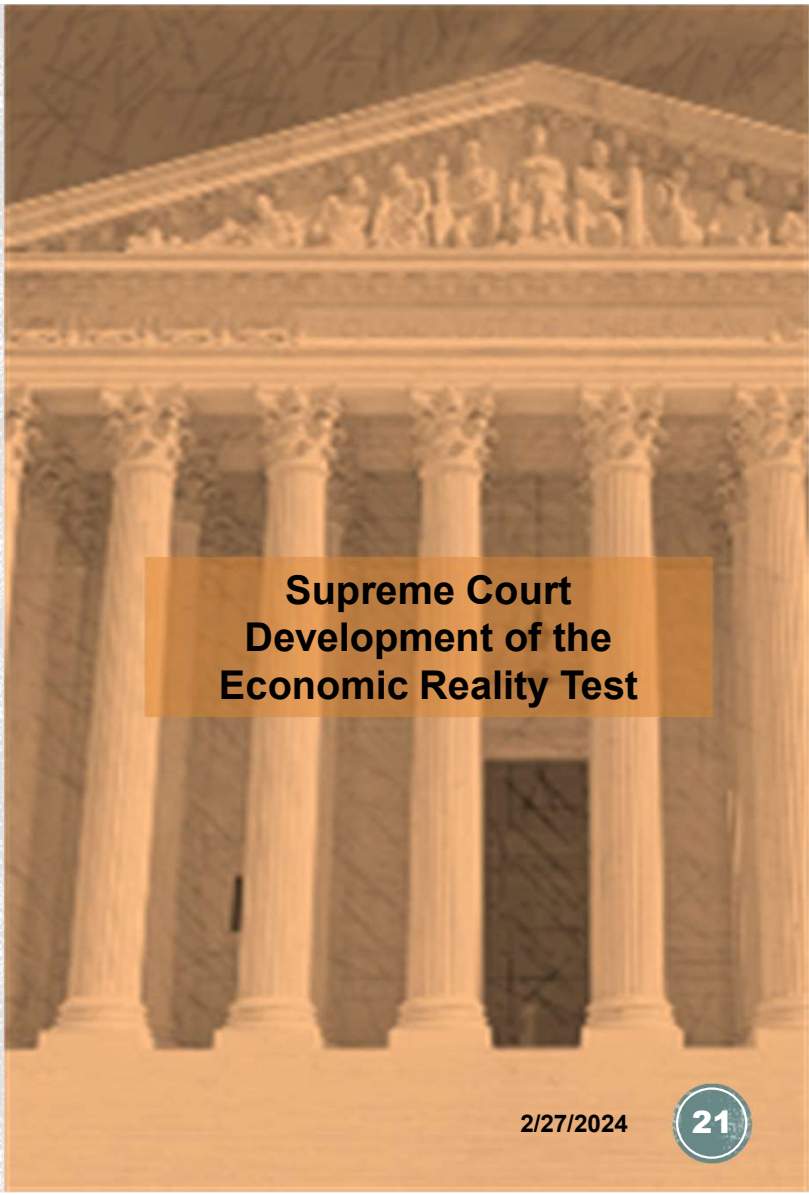
The factors generally include …

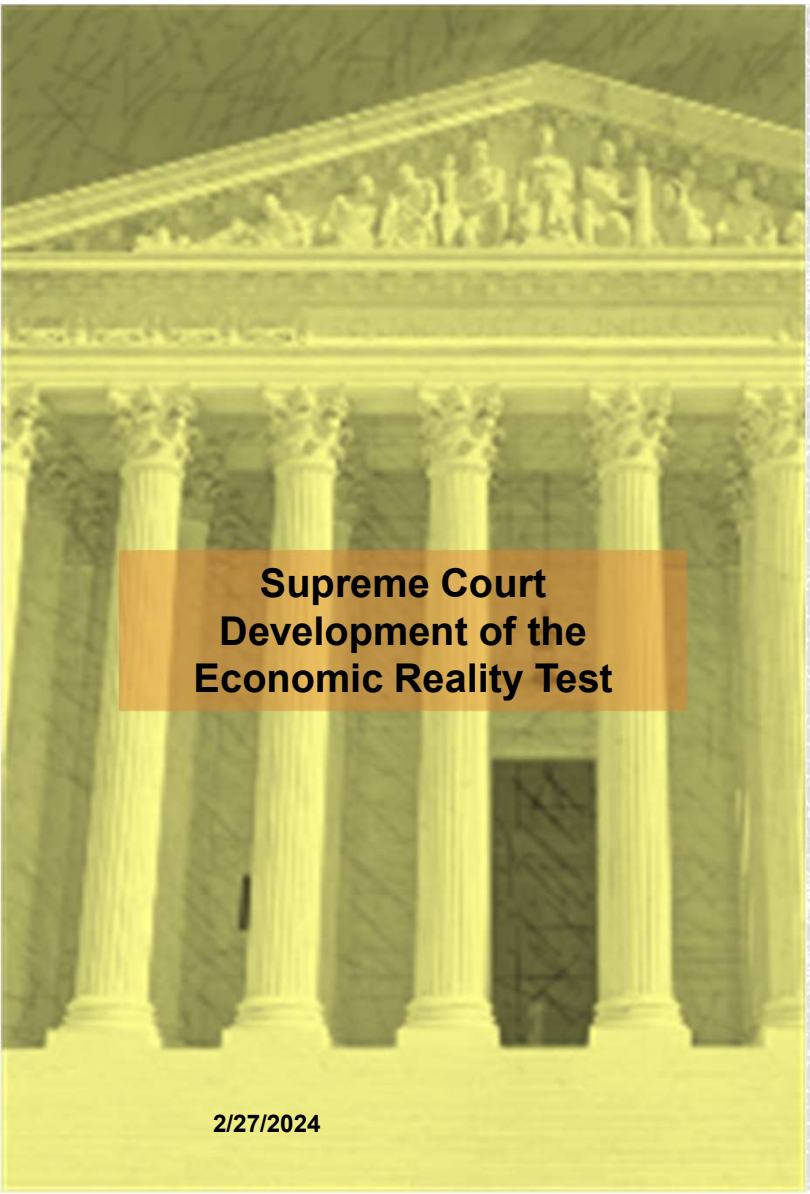
- **Permanency**
- **Investment**
- **Skill and Initiative**
- **Control**
- **Whether the work is an integral part of the employer's business**
- **Opportunity for Profit or Loss**

How has the U.S. Supreme Court interpreted the definitions?

- The Court has stated that *"[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame,"* and *that "the term 'employee' under the FLSA had been given 'the broadest definition that has ever been included in any one act."* [1]
- In particular, the Court *noted the "striking breadth" of section 3(g)'s "suffer or permit"* language, *observing that it "stretches the meaning of "employee" to cover some parties who might not qualify as such under a strict application of traditional agency law principles*. [2]
- The Court has repeatedly observed that the FLSA's scope of employment is broader than the common law standard often applied to determine employment status under other Federal laws. [3]

1. *(21)See United States v. Rosenwasser, 323 U.S. 360, 362, 363 n.3 (1945) (quoting 81 Cong. Rec. 7657 (statement of Senator Hugo Black)).*
2. (22)See *Nationwide Mut. Ins. v. Darden, 503 U.S. 318, 326 (1992)*
3. (23) *Id.; see also, e.g., Walling v. Portland Terminal Co., 330 U.S. 148, 150–51 (1947) ("[I]n determining who are 'employees' under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category.") (citation omitted)]*





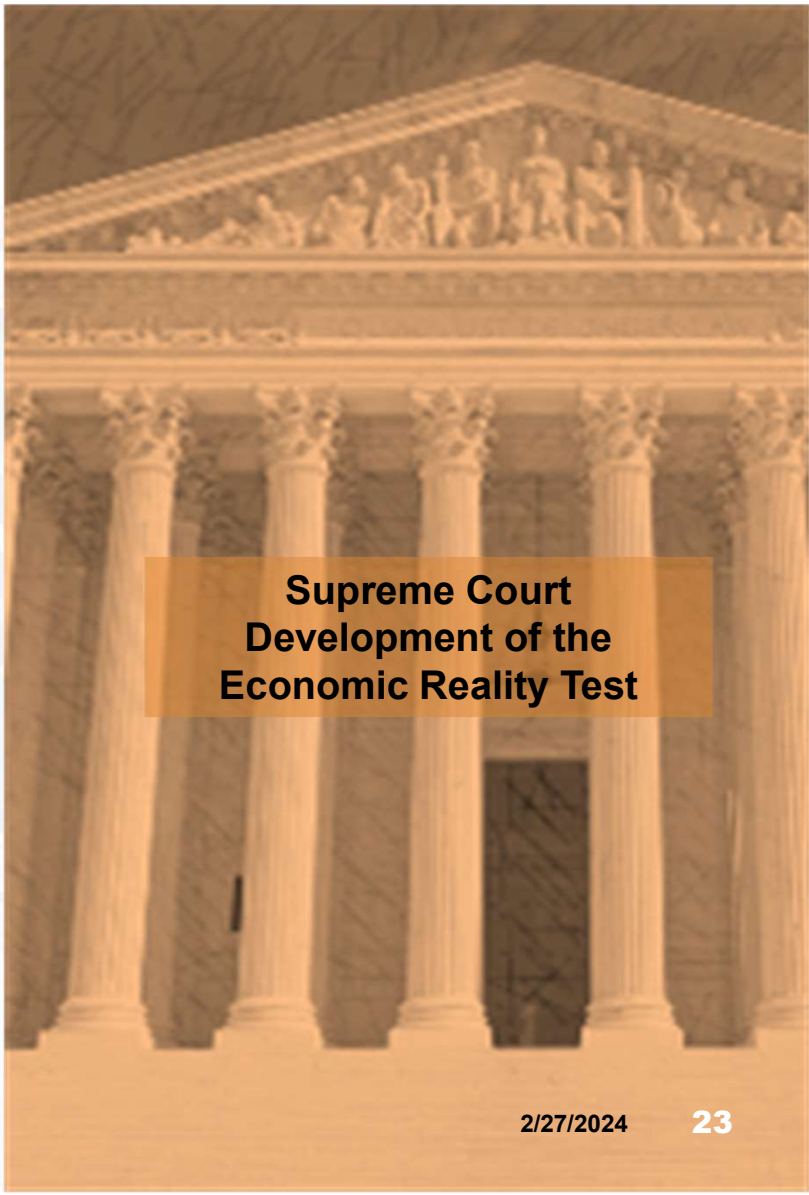
How has the U.S. Supreme Court interpreted the definitions? [Cont.]

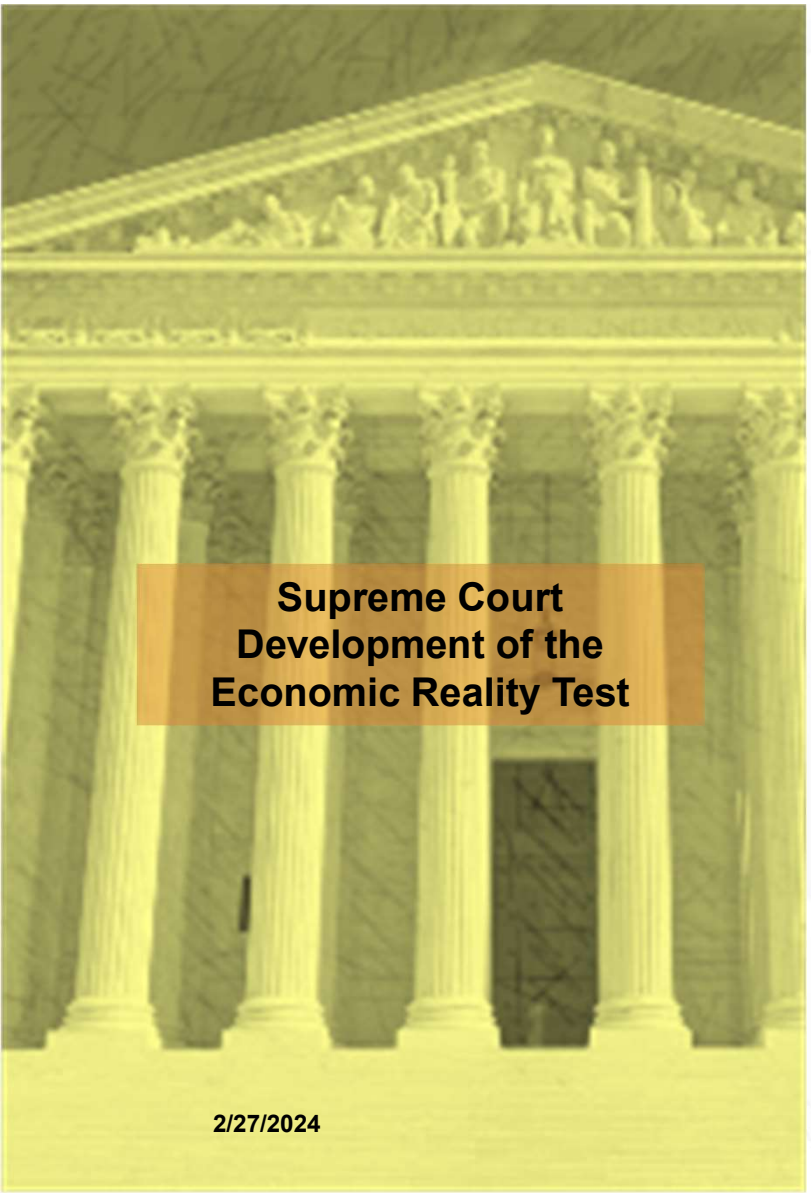
- The Court recognized that the Act was "not intended to stamp all person as employees. [1]
- The Court has recognized that "independent contractors" fall outside the Act's broad understanding of employment. [2]
- From 1944 to 1947, the U.S. Supreme Court considered employee or independent contractor status under three different Federal statutes that were enacted during the 1930's New Deal Era – (i) the FLSA, (ii) the National Labor Relations Act (NLRA), and (iii) the Social Security Act (SSA) – and applied an economic reality test under all three laws.
- First case, ***NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944),*** the Court considered the meaning of "employee" under the NLRA, which defined the term to "include any employee." ***[(30) 322 U.S. at 118–20; 29 U.S.C. 152(3)].***
- The Hearst Court rejected application of the common law standard, noting that "the broad language of the NLRS's definitions … leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications. ***[(31) Id. at 123–25, 129]***

1. (24) See 4Portland Terminal, 330 U.S. at 152]
2. *(25) See, e.g., Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (1947) (noting that "[t]here may be independent contractors who take part in production or distribution who would alone be responsible for the wages and hours of their own employees")]*

How has the U.S. Supreme Court interpreted the definitions? [Cont.]

- On **June 16th, 1947**, the Supreme Court decided ***United States vs. Silk, 331 U.S. 704 (1947)***, addressing the distinction between employees and independent contractors under the SSA. The Court favorably summarized Hearst as setting forth "economic reality," as opposed to "technical concepts" of the common law standard alone, as the framework for determining workers" classification, but acknowledge that not "all who render service to an industry are employees." ***[(32) See 331 U.S. at 712–14].*** The Court added that "[n]o one [factor] is controlling nor is the list complete." The Court went on to note that the workers in that case were "from one standpoint an integral part of the businesses" of the employer, supporting a conclusion that some of the workers in that case were employees.
- On the same day, it also issued a ruling on ***Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947),*** in which it affirmed a federal court of appeals decision that analyzed an FLSA employment relationship based on its economic realities***. [(36) See 331 U.S. at 727]*** Describing the FLSA as "a part of the social legislation of the 1930's of the same general character as the NLRA and SSA, the Court opined that "decisions that define the coverage of the employer-Employee relationship under the Labor and Social Security acts are persuasive in the consideration of a similar coverage under the FLSA. Accordingly, the Court rejected an approach based on "isolated factors" and again considered "the circumstances of the whole activity." The Court considered several of the factors that it listed in Silk and determined that the individuals noted were employees. It also noted among other things that they dis a specialty job on the production line, had no business organization that could shift to a different environment, and were best characterized as "part of the integrated unit of production under such circumstances that the workers performing the task were employees of the establishment."





How has the U.S. Supreme Court interpreted the definitions? [Cont.]

- On **June 23rd , 1947**, the court decided ***Bartels v. Birmingham, 332 U.S. 126 (1947),*** another case involving employee or independent contractor status under the SSA. The court once again rejected application of the common law control test, explaining that, under the SSA, employee status *"was not to be determined solely by the idea of control which an alleged employer may or could exercise over the details of the service rendered to his business by the worker*." ***[(41) 332 U.S. at 130].*** Rather, employees under "social legislation" such as the SSA are "those who as a matter of economic reality are dependent upon the business to which they render service. Thus, in addition to control, ''permanency of the relation, the skill required, the investment [in] the facilities for work and opportunities for profit or loss from the activities were also factors'' to consider.43 Although the Court identified these specific factors as relevant to the analysis, it explained that ''[i]t is the total situation that controls'' the worker's classification under the SSA.
- ***Goldberg v. Whitaker House Coop, Inc., 366 U.S. 28 (1961),*** the Court affirmed that '' 'economic reality' rather than 'technical concepts' '' remained ''the test of employment'' under the FLSA,48 quoting from its earlier decisions in Silk and Rutherford. The Court in Whitaker House found that certain homeworkers were ''not self-employed . . . [or] independent, selling their products on the market for whatever price they can command,'' but instead were ''regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates.'' 49 Such facts, among others, established that the homeworkers at issue were FLSA-covered employees.
- **Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992)** > the Court again endorsed application of the economic reality test to evaluate independent contractor status under the FLSA, citing to Rutherford and emphasizing the broad ''suffer or permit'' language codified in section 3(g) of the Act***. [(50) Darden, 503 U.S. at 325–26***].

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Application of the Economic Reality Test by Federal Courts of Appeals

How do Federal Courts of Appeals apply the economic reality test?

- Federal Courts of Appeals apply an economic reality test using the factors identified in Silk. No court of appeals considers any one factor or combination of factors to invariably predominate over the others.
- The ***Eleventh Circuit*** upholds the Supreme Court's explanation from Silk, that no one factor is controlling, nor is the list exhaustive. In addition, it has explained that some of the factors "which many courts have used as guides in applying the economic reality test and are …

1	The degree of the alleged employer's right to control the manner in which the work is to be performed.
2	The worker's opportunity for profit or loss depending upon their managerial skill.
3	The worker's investment in equipment or materials required for their task, or their employment of helpers.
4	Whether the service rendered requires a special skill.
5	The degree of permanence of the working relationship.
6	The extent to which the service rendered is an integral part of the alleged employer's business.

Application of the Economic Reality Test by Federal Courts of Appeals

U.S. Eleventh (11th) District Court of Appeals

Application of the Economic Reality Test by Federal Courts of Appeals

Fifth (5th) District Court of Appeals

Second (2nd) District Court of Appeals

DC District Court of Appeals

How do Federal Courts of Appeals apply the economic reality test? [Cont.]

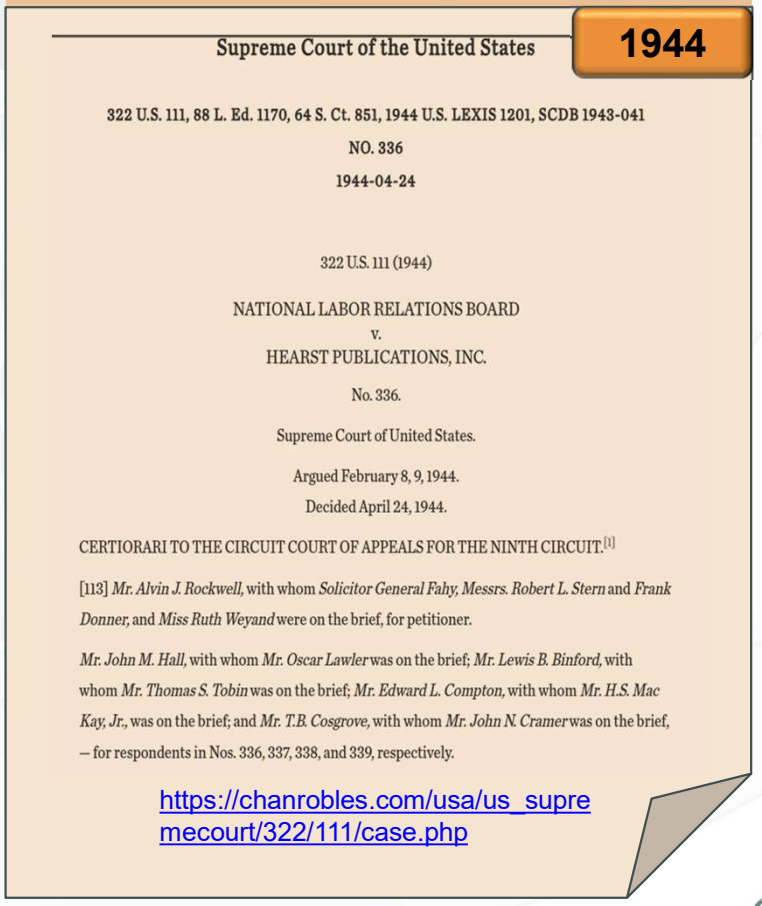
- Some courts of appeals have applied the factors with some variations. The ***Fifth (5th) Circuit*** typically does not list the "integral part" factor as one of the considerations that guides its analysis. ***[See Pilgrim Equip., 527 F.2d at 1311]*** However, recognizing that its list of enumerated factors is not exhaustive, they have considered the extent to which a worker's function is integral to a business as part of its economic realities analysis. [1]
- The ***Second and D.C. Circuits*** vary in that they describe the employee's opportunity for profit or loss and the employee's investment as a single factor, but they still use the same considerations as the other circuits to inform their economic realities analysis. [2]

1. (57) See **Hobbs v. Petroplex Pipe & Constr., Inc., 946 F.3d 824, 836 (5th Cir. 2020)** (considering "the extent to which the pipe welders' work was 'an integral part' of Petroplex's business"). Every other federal court of appeals that has decided an FLSA case involving alleged independent contractors includes the "integral part" factor among the list of enumerated economic reality factors. See the cases cited supra at n.52 other than Pilgrim Equipment.]
2. (58) See, e.g., **Franze v. Bimbo Bakeries USA, Inc., 826 F. App'x 74, 76 (2d Cir. 2020); Superior Care, 840 F.2d at 1058–59.** The D.C. Circuit has adopted the Second Circuit's articulation of the factors, including treating opportunity for profit or loss and investment as one factor. See **Morrison, 253 F.3d at 11** (citing **Superior Care, 840 F.2d at 1058–59**)

Summary

- Since 1940s, federal courts have analyzed the question of employee or independent contractor status under the FLSA using a multifactor, totality-of-the-circumstances economic reality test, with no factor or factors being dispositive.
- The courts have examined the economic realities of the employment relationship to determine whether the worker is economically dependent on the employer for work or is in business for themselves, even if they have varied slightly in their articulations of the factors.
- Despite such variation, all courts have looked to the factors first articulated in Silk as useful guidepost while acknowledging that those factors are not exhaustive and should not be applied mechanically.

Application of the Economic Reality Test by Federal Courts of Appeals



Supreme Court of the United States

1944

322 U.S. 111, 88 L. Ed. 1170, 64 S. Ct. 851, 1944 U.S. LEXIS 1201, SCDB 1943-041

NO. 336

1944-04-24

322 U.S. 111 (1944)

NATIONAL LABOR RELATIONS BOARD
v.
HEARST PUBLICATIONS, INC.

No. 336.

Supreme Court of United States.

Argued February 8, 9, 1944.

Decided April 24, 1944.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.[1]

[113] *Mr. Alvin J. Rockwell*, with whom *Solicitor General Fahy*, *Messrs. Robert L. Stern* and *Frank Donner*, and *Miss Ruth Weyand* were on the brief, for petitioner.

Mr. John M. Hall, with whom *Mr. Oscar Lawler* was on the brief; *Mr. Lewis B. Binford*, with whom *Mr. Thomas S. Tobin* was on the brief; *Mr. Edward L. Compton*, with whom *Mr. H.S. Mac Kay, Jr.*, was on the brief; and *Mr. T.B. Cosgrove*, with whom *Mr. John N. Cramer* was on the brief, – for respondents in Nos. 336, 337, 338, and 339, respectively.

https://chanrobles.com/usa/us_supremecourt/322/111/case.php

Application of the Economic Reality Test

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Overview

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What steps did the department take after the Rutherford and Silk case?

On **June 23rd, 1949** > The *Wage and Hour Division (WHD)* issued an opinion letter distilling six "primary factors which the Court considered significant" in *Rutherford* and *Silk. This factors are …*

1. The extent to which the services in question are an integral part of the 'employer[']s' business.
2. The amount of the so-called 'contractor's' investment in facilities and equipment.
3. The nature and degree of control by the principal.
4. Opportunities for profit and loss.
5. The amount of initiative judgment or foresight required for the success of the claimed independent enterprise.
6. Permanency of the relation. ***[(59) WHD Op. Ltr. (June 23, 1949)]***

The guidance cautioned that no single factor is controlling, and *"[o]rdinarily a definite decision as to whether* one is an employee or an independent contractor *under the [FLSA] cannot be made in the absence of evidence as to [the worker's] actual day-to-day working relationship with [their] principal*. Clearly a written contract does not always reflect the true situation."

What steps did the department take after the Rutherford and Silk case? [Cont.]

- **1962** > The Department revised the regulations in 29 CFR part 788, which generally provides interpretive guidance on he FLSA's exemption for employees in small forestry or lumbering operations and added a provision addressing the distinction between employees and independent contractors. ***[(63) See 27 FR 8032; 29 U.S.C. 213(b)(28) (previously codified at 29 U.S.C. 213(a)(15))]***
- **1972** > The Department added similar guidance [noted in 1962] on independent contractor status at 29 CFR 780.330(b), in a provision addressing the employment status of sharecroppers and tenant farmers. ***[(64) 27 FR 8033 (29 CFR 788.16(a)]***. This regulation was nearly identical to the independent contractor guidance for the logging and forestry industry previously codified at 29 CFR 788.16(a), including an identical description of the same six economic reality factors. ***Both provisions—29 CFR 780.330(b) and 788.16(a)—remained unchanged until 2021.***
- **1997** > the Department promulgated a regulation applying a multifactor economic reality analysis for distinguishing between employees and independent contractors under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), which notably incorporates the FLSA's "suffer or permit" definition of employment by reference. ***[(69) See 62 FR 11734 (amending 29 CFR 500.20(h)(4)); see also 29 U.S.C. 1802(5) ("The term 'employ' has the meaning given such term under section 3(g) of the [FLSA]").]***

What did the non-amended regulation specific to farm labor advised?

The regulation (which has not since been amended) advises that in determining if the farm labor contractor or worker is an employee or an independent contractor, the ultimate question is the economic reality of the relationship—whether there is economic dependence upon the agricultural employer/association or farm labor contractor, as appropriate. The regulation elaborates that "[t]his determination is based upon an evaluation of all of the circumstances, including the following:

1. The nature and degree of the putative employer's control as to the manner in which the work is performed.
2. The putative employee's opportunity for profit or loss depending upon his/her managerial skill.
3. The putative employee's investment in equipment or materials required for the task, or the putative employee's employment of other workers.
4. Whether the services rendered by the putative employee require special skill.
5. The degree of permanency and duration of the working relationship.
6. The extent to which the services rendered by the putative employee are an integral part of the putative employer's business..

This description of six economic reality factors was very similar to the earlier description of six economic reality factors provided in ***29 CFR 780.330(b)*** and ***788.16(a)***.

[See 29 CFR 500.20(h)(4).]

What steps did the department take after the Rutherford and Silk case? [Cont.]

- **1997** > WHD issued ***Fact Sheet #13 Employment Relationship Under the Fair Labor Standards Act (FLSA).*** This Sheet advices that an employee, as distinguished from a person who is engaged in a business of their own, is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which they serve. The fact sheet identifies the six familiar economic realities factors, as well as consideration of the worker's degree of independent business organization and operation.
- **July 15th, 2015** > WHD issued additional sub-regulatory guidance, Administrator's Interpretation No. 2015-1, ***"The Application of the Fair Labor Standard's Act 'Suffer or Permit' Standards in the Identification of Employees Who are Misclassified as Independent Contractors"*** (AI 2015-1). **AI 2015–1** reiterated that the economic realities of the relationship are determinative and that the ultimate inquiry is whether the worker is economically dependent on the employer or truly in business for themself. It identified six economic realities factors that followed the six factors used by most federal courts of appeals. It further emphasized that the factors should not be applied in a mechanical fashion and that no one factor was determinative. ***AI 2015–1 was withdrawn on June 7, 2017***.
- In ***2019***, WHD issued an opinion letter, FLSA2019–6, regarding whether workers who worked for companies operating self-described "virtual marketplaces" were employees covered under the FLSA or independent contractors. ***The Department later withdrew Opinion Letter FLSA2019–6 on February 19, 2021***

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Impact of Supreme Court and Appeal Court Cases on DOL's Legislation

How did the first cases impact legislation?

Following the Supreme Court decisions, Congress responded with separate legislation to amend the NLRA and SSA's employment definitions as follows ...

- In 1947, Congress amended the *NLRA's definition* of *"employee"* to clarify that the term *"shall not include any individual having the status of an independent contractor*.
- The Following years, Congress similarly amended the *SSA* to exclude from employment *"Any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor.* ***[(45) Labor Management Relations (Taft-Hartley) Act, 1947, Public Law 80–101, sec. 101, 61 Stat. 136, 137–38 (1947) (codified as amended at 29 U.S.C. 152(3))]***
- Despite the amendments made to NLRA and SSA in response to *Hearts and Silk*, *Congress did not amend the FLSA* following the *Rutherford* decision.

The Supreme Court interpreted the amendments to the NLRA as having the same effect as the explicit definition included in the SSA, which was to ensure that employment status would be determined by common law agency principles, rather than an economic reality test. [1]

1. (47) See NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968) (noting that "[t]he obvious purpose of" the amendment to the definition of employee under the NLRA "was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act")

What were the five economic reality factors identified in 2021 by DOL?

The ***Department of Labor (DOL)*** identified FIVE (5) economic reality factors under the 2021 IC rule to be used as a guide in determining the status of a worker.

CORE FACTORS

1. Nature and Degree of control over the work.
2. The worker's opportunity for profit or loss.

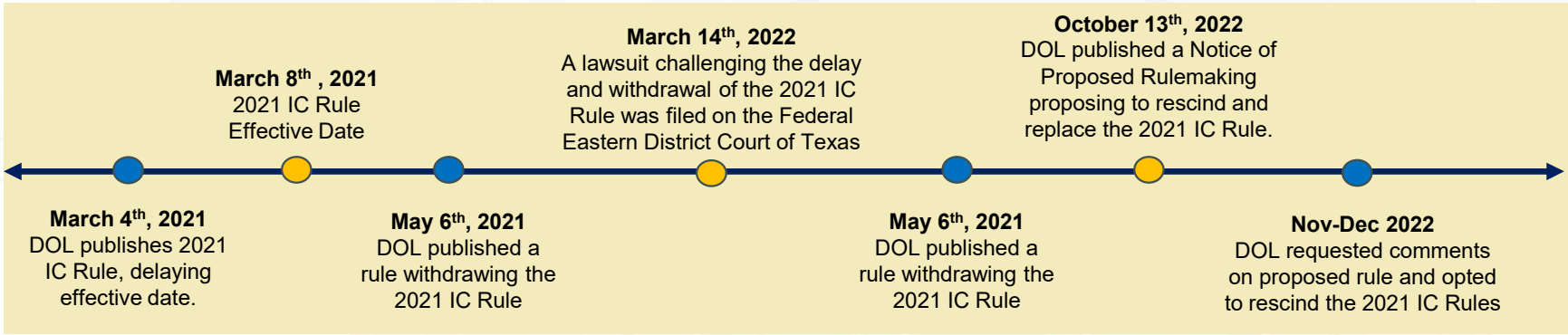
NON-CORE FACTORS[1]

3. Amount of skill required for the work.
4. Degree of permanence of the working relationship between the worker and the potential employer.
5. Whether the work is part of an integrated unit of production.

The first two items are deemed CORE FACTORS and therefore are most probative and carried greater weight in the analysis. The last three items are deemed non-core factors.

1. The ***2021 IC Rule*** stated that it was ***"Highly unlikely"*** that these three non-core factors could outweigh the combined probative value of the two core factors.

What triggered a lawsuit on the 2021 IC Rule and how it impacted the process?



- The ***March 14th, 2022*** lawsuit led to a decision by the court vacating the Delay and Withdrawal Rules and concluding that the 2021 IC Rule became effective on the original effective date of March 8th , 2021. ***[See Coal. for Workforce Innovation v. Walsh, No. 1:21–CV–130, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022), appeal filed, No. 22–40316 (5th Cir. May 13, 2022) ("CWI v. Walsh")]***
- The ***October 13th, 2022*** proposal explained that upon further consideration, the Department believed that the 2021 IC Rule did not fully comport with the FLSA's text and purpose as interpreted by courts and departed from decades of case law applying the economic reality test.
- DOL believed that retaining the 2021 IC Rule would have a confusing and disruptive effect on workers and businesses alike due to tis departure from case law describing and applying the multifactor economic reality test as a totality-of-the circumstances test and because it departed from legal precedent, it was not clear whether courts would adopt its analysis- a question that could take years of appellate litigation in different federal courts of appeals to sort out, resulting in more uncertainty as to the applicability test.
- It was also determined that the 2021 IC Rule's departure from the longstanding test applied by the courts could result in greater confusion among employers in applying the new analysis, which could place workers at greater risk of misclassification as independent contractors due to the new analysis being applied improperly, and thus could negatively affect both the workers and competing businesses that correctly classify their employees.

Why the department opted to rescind and replace the 2021 IC Rule?

Because the rule was not fully aligned with the FLSA's text as interpreted by the courts or the Department's longstanding analysis, as well as decades of case law describing and applying the multifactor economic reality test. In fact, *the department had three primary and overlapping legal concerns with the 2021 IC Rule* …

1. its creation of two "core factors" as the "most probative" in the economic reality analysis
2. the oversized role of the control factor in its analysis; and
3. its altering of several economic reality factors to minimize or exclude key facts commonly analyzed by courts.

See 87 FR 62227–29. The Department had previously identified and discussed these three concerns in its 2021 Withdrawal Rule. See 86 FR 24307–15.

How did the 2021 IC Rule depart from the courts and DOL's perspective?

- It departed from the Departments longstanding precedent unduly narrowing the economic reality test by limiting facts that may be considered as part of the test that are relevant in determining whether a worker is economically dependent on the employer for work or is in business for themself.
- It restricted the Act's expansive definitions of "employer," "employee," and "employ," undermining the Act's text and purposes, as interpreted by courts and the Department's longstanding interpretation of the economic reality test.
- It articulated the economic reality test, elevating two factors (control and opportunity for profit or loss) as "core" factors above other factors, asserting that the two core factors have "greater probative value" in determining a worker's economic dependence.
- This then noted that if both core factors point toward the same classification—either employee or independent contractor—then there is a "substantial likelihood" that this is the worker's correct classification.
- Although it identified three other factors as additional guideposts and acknowledged that additional factors may be considered, it made clear that non-core factors "are less probative and, in some cases, may not be probative at all, and thus are highly unlikely, either individually or collectively, to outweigh the combined probative value of the two core factors. ***[(5) Id. at 1246 (§ 795.105(c))]***
- The 2021 IC Rule's elevation of the control and opportunity for profit or loss factors was in tension with the language of the Act as well as the longstanding judicial precedent, expressed by the Supreme Court and in appellate cases from across the circuits, that no single factor is determinative in the analysis of whether a worker is an employee or an independent contractor, nor is any factor or set of factors necessarily more probative of whether the worker is in fact economically dependent on the employer for work as opposed to being in business for themselves.

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Changes on 2024's FINAL Rule on FLSA

Overview

How does this FINAL Rule differ from the 2021 IC Rule?

- It returns to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity.
- It returns to the longstanding framing of investment as its own separate factor, and the integral factor as one that looks to whether the work performed is an integral part of a potential employer's business rather than part of an integrated unit of production.
- It provides broader discussion of how scheduling, remote supervision, price setting, and the ability to work for others should be considered under the control factor, and it allows for consideration of reserved rights while removing the provision in the 2021 IC Rule that minimized the relevance of retained rights.
- It discusses exclusivity in the context of the permanency factor, and initiative in the context of the skill factor.
- It clarifies the departments consideration of the relative investments of the worker and the potential employer should be compared not only in terms of dollar value or size of the investments but should focus on whether the worker is making similar types of investments as the employer (albeit on a smaller scale) that would suggest that the worker is operating independently.
- It includes language recognizing that costs that are unilaterally imposed are not indicative of a worker's capital or entrepreneurial investment.
- It reiterates that part 795 contains the Department's general interpretations for determining whether workers are employees or independent contractors under the FLSA. It further reiterates that economic dependence is the ultimate inquiry, meaning that a worker is an independent contractor as opposed to an employee under the Act IF the worker is, as a matter of economic reality, in business for themselves.
- It explains that the economic reality test is comprised of multiple factors that are tools or guides to conduct the totality-of-the-circumstances analysis to determine economic dependence. It provides guidance on how six economic reality factors should be considered.

What are the new economic reality factors?

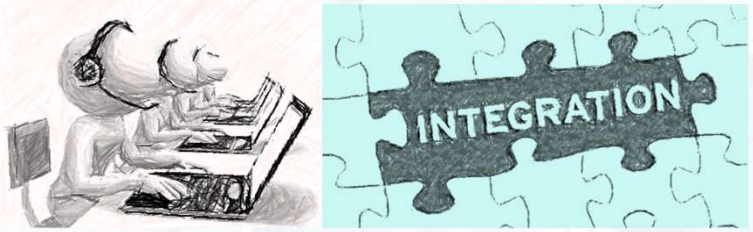
There are six (6) new factors that are to guide an assessment of the economic realities of the working relationship, but no one factor, or subset of factors is necessarily dispositive. This factors are …

1. **Opportunity for profit or loss depending on managerial skill**
2. **Investments by the worker and potential employer**
3. **The degree of permanence of the work relationship**
4. **The nature and degree of control**
5. **The extent to which the work performed is an integral part of the potential employer's business**
6. **Skill and initiative**

- **In accordance with longstanding precedent and guidance, *additional factors may also be considered if they are relevant to the overall question of economic dependence.***
- **The decision to return to *a totality-of-the-circumstances analysis* in which the economic reality factors are not assigned a predetermined weight and each factor is given full consideration represents a change that is most beneficial as it aligns with the department's decades long approach and with federal appellate case law.**

Six (6) Reality Factors

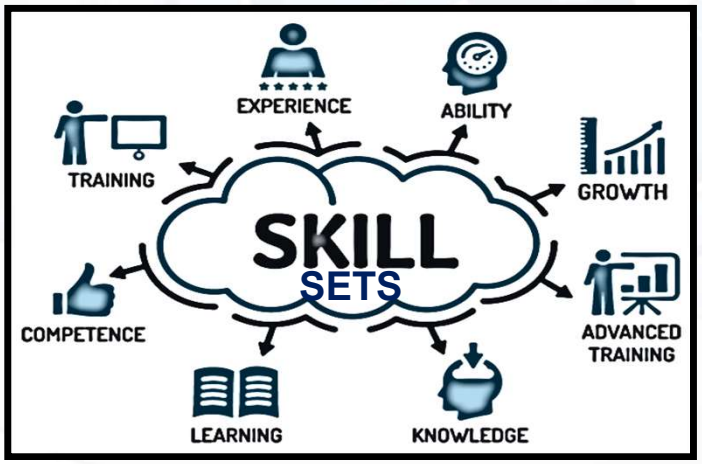
Degree of Control



Extent to which the work performed is an integral part of the potential employer's business.

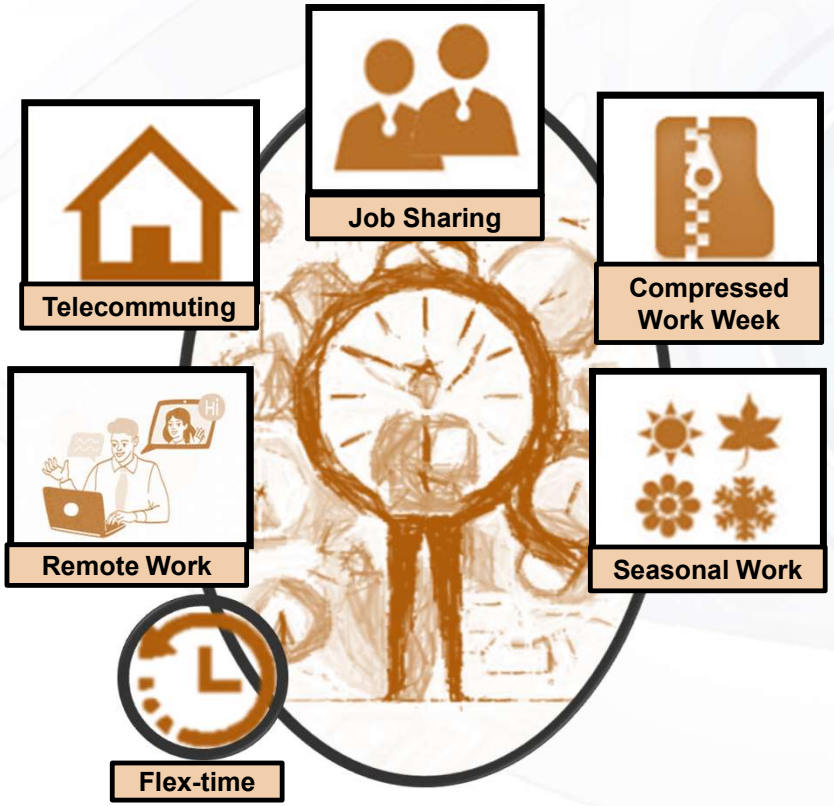
Investment by each party

Opportunity for Profit or Loss



Work Relationship

How can modern work arrangements benefit from the multifactor test?



- Modern work arrangements utilizing applications or other technology are best addressed using the underlying economic reality test, which considers the totality of the circumstances in each working arrangement and offers a flexible, comprehensive, and appropriately nuanced approach which can be adapted to disparate industries and occupations
- It can also encompass continued social changes because it does not presume which aspects of the work relationship are most probative or relevant and leaves open the possibility that changed circumstances may make certain factors more important in certain cases or future scenarios

Does this rule recognize the importance of Independent Contractors?

YES

- This final rule recognizes that independent contractors serve an important role in our economy and provides a consistent approach for those businesses that engage (or wish to engage) independent contractors as well as for those who wish to work as independent contractors.
- The Department believes that it provides more consistent guidance to employers as they determine whether workers are economically dependents on the employer for work or are in business for themselves, as well as useful guidance to workers on whether they are correctly classified as employees or independent contractors.

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2021 IC Public Feedback

Overview

This section provides a high-level summary of commenter views. Significant issues raised in the comments received are discussed in subsequent sections of this preamble, along with the Department's response to those comments and a discussion of resulting changes that have been made in the final rule's regulatory text. All comments received may be viewed on the http://www.regulations.gov website, docket ID WHD–2022–0003.

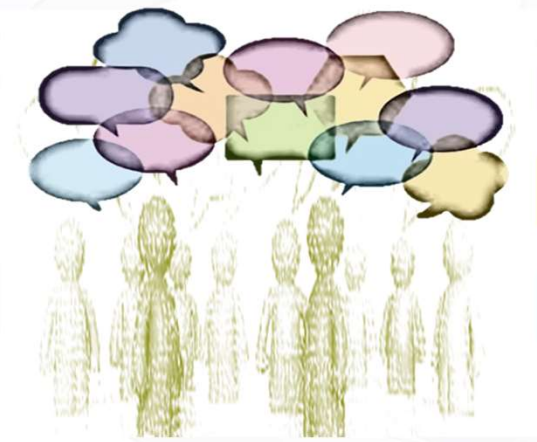
The Department Received approximately *55,400* comments on the NPRM. Comments were submitted by a diverse array of Stakeholders including …

- Employees
- Labor Unions
- Advocacy Groups
- Businesses
- Trade Associations
- Self-Identified Independent Contractors
- State and Local Government Officials
- Law Firms
- Members of Congress

And other interested members of the public.

How are the comments characterized?

The Department has characterized the comments in the following ways …



Very General statements of support or opposition

Personal anecdotes that did not address a specific aspect of the proposal

Identical or nearly identical "campaign" comments sent in response to comment initiatives sponsored by various groups.

Other comments provided specific data, views, and arguments, which are described throughout this preamble. Commenters expressed a wide variety of views on the merits of the Department's proposal. Acknowledging that there are strong views on the issues presented in this rulemaking, the Department has carefully considered the comments submitted.

- This proposed guidance

What was the main item addressed by the rulemaking open for comments?

It specifically addresses the legal distinction between FLSA covered employees and independent contractors

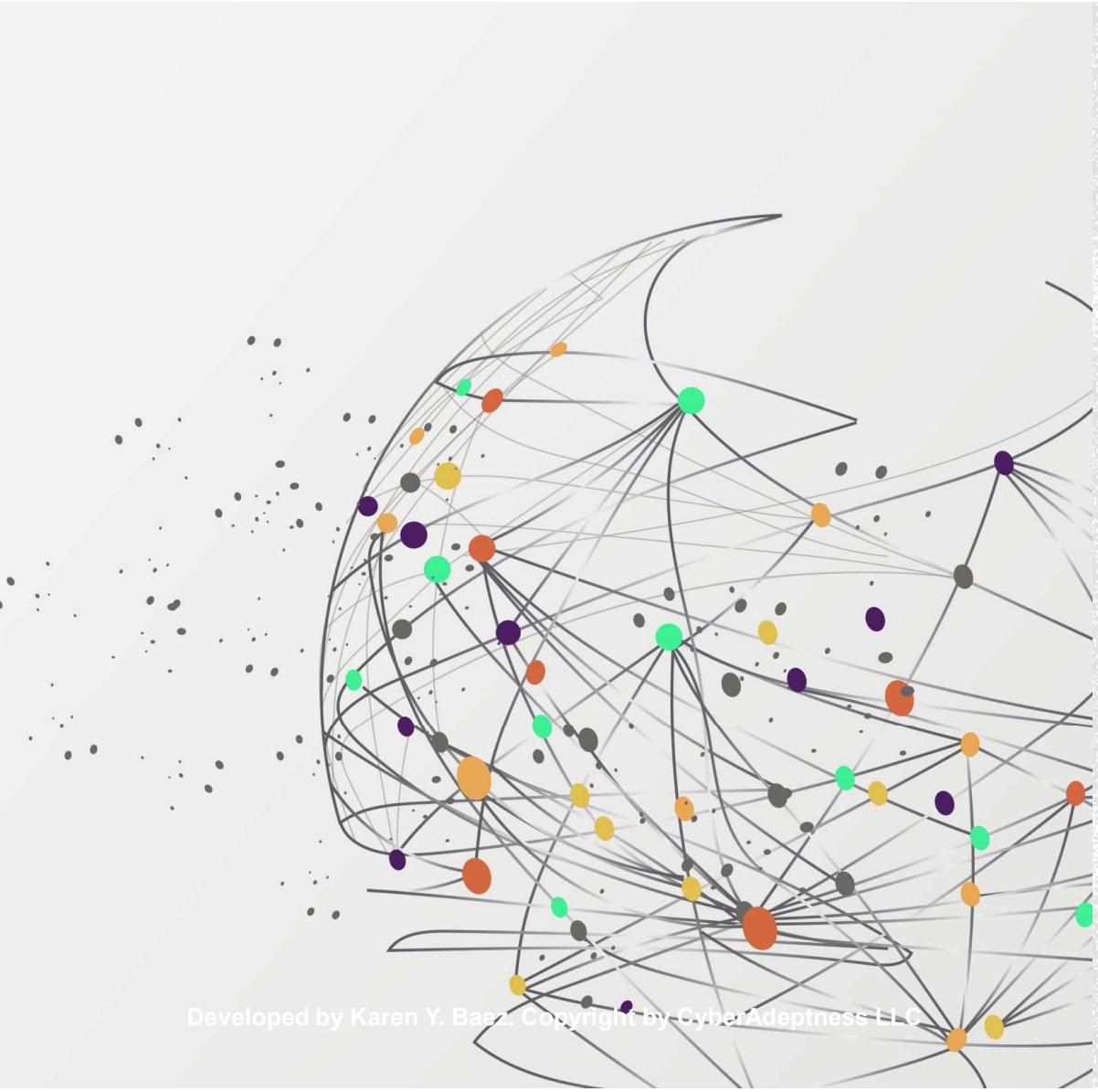
Question	Answer
What IS NOT addressed in this Ruling?	It does not replace or supplant the analyses that courts and the Department apply when evaluating FLSA coverage of other kinds of workers, such as unpaid interns, students, trainees, or volunteers.107 Coverage for the types of workers mentioned is not addressed in this rule.
What is this guidance meant to protect?	This guide is meant to protect workers from misclassification while at the same time provide a consistent approach for those businesses that engage (or wish to engage) with properly classified independent contractors by incorporating detailed regulations addressing the multifactor economic reality test – in a way that it fully reflects the case law and continues to be relevant to the evolving economy.

What triggered the modifications to the 2021 IC Rule?

The Department felt that the rule required modification because …

1. **There's Confusion regarding the meaning of *"economic dependence"* as the concept is under-developed.**
2. **There's lack of focus in the multifactor balancing test**
3. **Confusion and inefficiency due to overlapping factors**
4. **Shortcomings of the economic reality test that are more apparent in the modern economy.**
5. **Economic reality test hindered innovation in work arrangements.**

The Department believes that modifications would lead to a better framework for understanding and applying the concept of economic dependence by explaining how the touchstone of whether an individual is in business for themselves is analyzed within each of the six economic realities factors and to ensure the process is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule.



§795.105 > Economic Dependence

Overview

What's the Department's stance on economic dependence?

The Department, retaining its longstanding interpretation, as it did in the 2021 IC Rule is that …

Economic dependence is the ultimate inquiry and that an employee is someone who, as a matter of economic reality, is economically dependent on an employer for work- not for income. [1]

However, the department understand that this particular concept of economic dependence is underdeveloped in the case law.

The Department notes that this concept of economic dependence—*one which does not focus on the amount of income earned or whether the worker has other income streams*—has been the Department's consistent position.

1. (115) **See 86 FR 1246 (§ 795.105(b)** ("An employer suffers or permits an individual to work as an employee if, as a matter of economic reality, the individual is economically dependent on that employer for work."); see also infra section V.B.; 29 CFR 795.105(b) ("An 'employee' under the Act is an individual whom an employer suffers, permits, or otherwise employs to work. . . . [This is] meant to encompass as employees all workers who, as a matter of economic reality, are economically dependent on an employer for work. . . . Economic dependence does not focus on the amount of income earned, or whether the worker has other sources of income.").

How have the courts applied the economic dependence test?

Historically speaking the courts have …

1. Applied a ***"dependence-for-work"*** approach which considers whether the worker is dependent on the employer for work or depends on the worker's own business for work.
2. In a few cases, applied a ***"dependence-for-income"*** approach that considers whether the worker has other sources of income or wealth or is financially dependent on the employer. ***[See 86 FR 1172–73]***

Are the two factors noted enough?

No, the Department believes that developing *the concept of economic dependence is better accomplished by*, in addition to elaborating on the general meaning of economic dependence, *explaining how each of the six factors can illuminate the distinction between economic dependence on the employer for work and being in business for oneself. It is the departments belief that the multifactor economic reality test relied on by courts where no one factor or set of factors is presumed to carry more weight is the most helpful tool for evaluating modern work arrangements.*

What changes were proposed by the Department?

- The Department proposed to simplify § 795.105(a) of the 2021 IC Rule and make additional clarifying edits to § 795.105(b). ***[(203) 87 FR 62233 (proposed § 795.105(a), (b))]***
- Proposed § 795.105(a) would continue to make clear, as the 2021 IC Rule did, that independent contractors are not ''employees'' under the Act.
- The Department did not receive significant comments regarding this and is adopting it without change.
- The Department proposed that paragraph § 795.105(b) would affirm that economic dependence is the ultimate inquiry for determining whether a worker is an independent contractor or an employee; this paragraph also makes clear that the plain language of the statute is relevant to the analysis***. [(204) 87 FR 62233 (proposed § 795.105(b))]***
- The Department explained that this proposed section would focus the analysis on whether the worker is in business for themself and clarified that economic dependence does not focus on the amount the worker earns or whether the worker has other sources of income.

What type of comments stakeholders submitted?

"urged the Department to "recognize that economic dependence often does not exist and certainly should not be presumed" and that it "should be the subject of a threshold inquiry prior to applying the other factors in the economic realities test, or, at a minimum, added as an additional factor."

Cetera

https://cetera.com/

Department's Answer to Cetera's concern is as follows:

- As the Department explained in the NPRM, the question of economic dependence is the ultimate inquiry, and the factors are tools or guideposts for answering that inquiry, so it would not be appropriate to make "economic dependence" an additional factor or a threshold inquiry.
- The Department agrees, however, that economic dependence should never be presumed and that when it does not exist, that worker is not an employee.

Commenters generally agreed that economic dependence was the right lens for evaluating whether an employment relationship exists under the FLSA.

The AFL–CIO and others, for example, noted that "[c]ourts have interpreted the FLSA's broad suffer or permit to work language as seeking to answer one foundational question regarding the relationship between a worker and the entity to whom that worker provides their labor—whether as a matter of economic reality that worker is dependent upon the business to which they render service."

AFL-CIO
AMERICA'S UNIONS

https://aflcio.org/

What type of comments stakeholders submitted?

"the proposal "creates a broad new definition of 'economic dependence' that does not focus on the amount of income earned or whether the independent contractor has other income streams."

https://www.goldwaterinstitute.org/

"using the idea of economic dependence as a "litmus test" is "exceptionally challenging to prove or meet in today's complex world of business operations for both large and small business."

https://www.vegaschamber.com/

"suggested that the provision be edited for clarity, noting that the regulatory language referring to "other income streams" is "unnecessarily abstract and confusing" and suggested incorporating alternative language from the preamble that the Department will be adopting."

Smith Summerset & Associates LLC

https://www.smithwagehour.com/

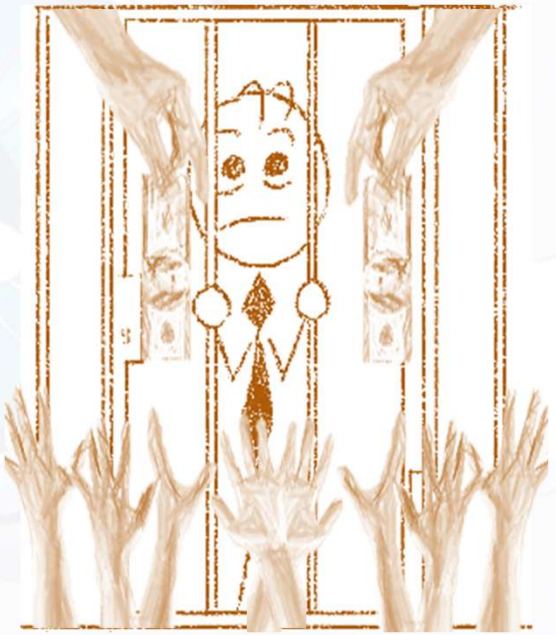
- *Some commenters stated that the Department's proposed language broadened the definition of "economic dependence" and objected to this perceived broadening. [See, e.g., Goldwater Institute, Job Creators Network Foundation]*
- One freelancer explained that "self-employed independent contractors do not see it as having that many employers [but rather] view those publications as customers."
- Several commenters further stated that the Department had put forward a new definition of economic dependence *"that a worker is an employee if they are merely 'economically dependent' on a business in a small or inconsequential way." See, e.g., NAIFA.*

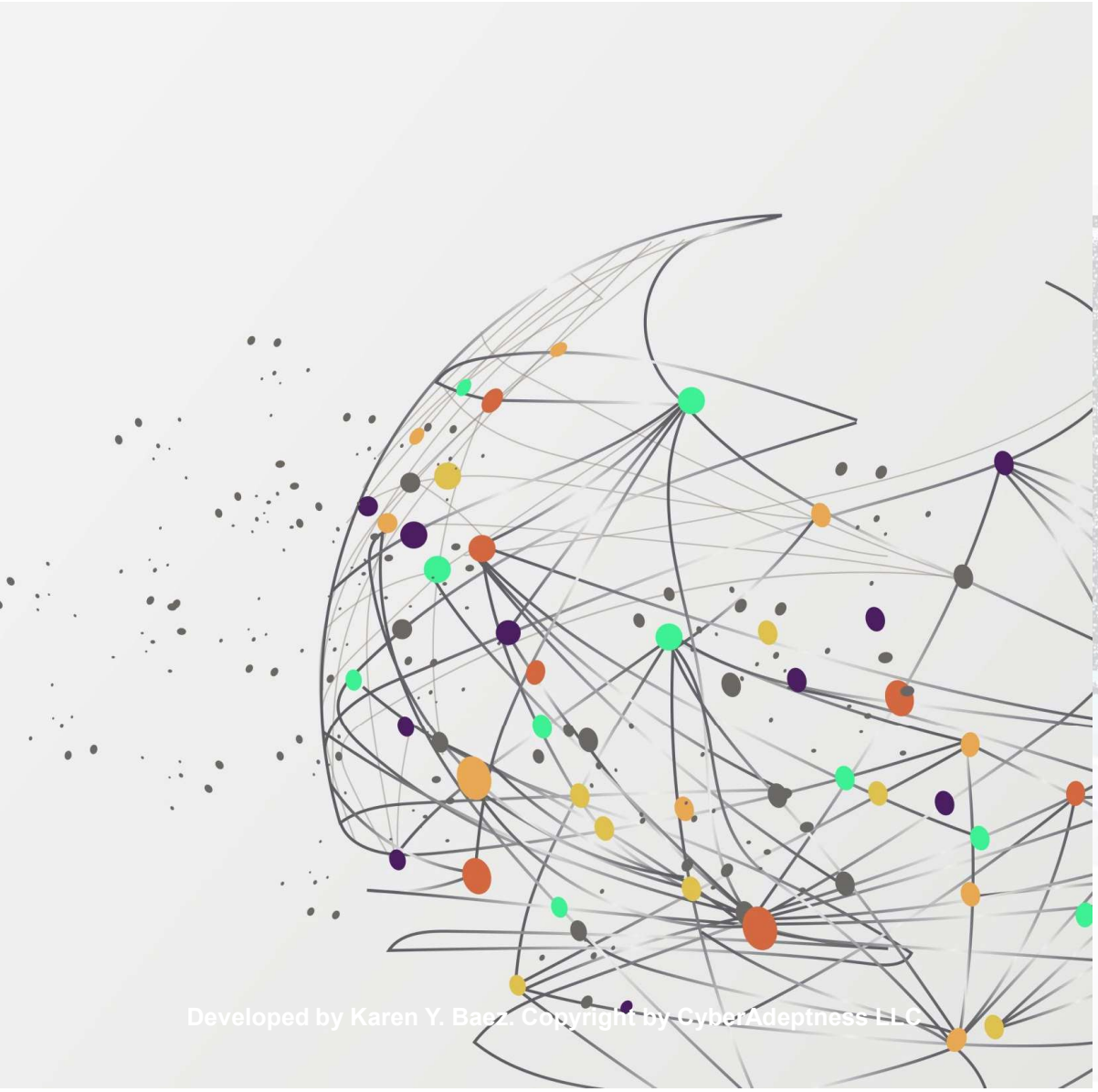
"the Department's proposed definition of economic dependence "wrongly states that a worker can be an employee merely because she is dependent in some way on a business, and it incorrectly says that a worker's income is entirely irrelevant to whether a worker is dependent on a business."

https://www.law.gmu.edu/academics/clinics/

Economic Dependence §795.105

- The Departments position on Economic Dependence is one which does not focus on the amount of income earned or whether the worker has other income streams .
- The concept of economic dependence in the NPRM and this final rule is identical to the 2021 IC Rule, which stated that, *"other forms of dependence, such as dependence on income or subsistence, do not count"* and that *"dependence of income or subsistence*," is not a relevant consideration in the economic reality test.
- 105 (a) The Department uses the phrase *"worker's potential employer"* or *"potential employer"* instead of the word *"employer".*
- The terms "employer," "potential employer," and "the worker's potential employer" throughout the preamble discussion, and *the terms are not intended to predetermine any result*.
- The Department is making it clear that other sources of income or amount of pay are not relevant to economic dependence.
- 105 (b) Affirm that economic dependence is the ultimate inquiry for determining whether a worker is an independent contractor, or an employee and it also makes clear that the plain language of the statute is relevant to the analysis.
- 105 (c) and (d) of the 2021 IC Rule has been removed and discussion of the economic reality test and the individual factors is being moved to §795.110.





§795.110 > Economic Reality Test and Economic Reality Test Factors

Overview

2/27/2024

What changes did the Department proposed?

The Department proposed to replace the *2021 IC Rule* with a provision discussing the economic reality and the economic reality factors.

It proposed *§795.110 (a) introduced the economic reality test, emphasizing that the economic reality factors are guides to be used to conduct a totality-of-the-circumstances analysis. It also explained that the factors are not exhaustive, and no single factor is dispositive.* ***[(211) 87 FR 62234–37 (proposed § 795.110)]***

The Department notes that the cases addressing employee vs. independent contractor status discussed in this rule and using the economic reality test *apply to a wide range of today's workers, from cable installers to exotic dancers to health care workers, and the Department's enforcement experience applying the economic reality test is similarly varied.*

With this rulemaking, the Department *describes the economic reality factors that reflect the totality-of-the-circumstances approach that courts have taken for decades and are still applying to today's workplaces and provides an analysis as to how the Department considers each factor in today's workplaces, based on case law and the Department's enforcement expertise in this area.*

When was the Economic Reality Test developed and by whom?

The economic reality test was developed by the Supreme Court in interpreting and applying the social legislation of the 1930s, including the FLSA.
[(224) See Rosenwasser, 323 U.S. at 362]

As explained in Rutherford, the *"economic reality"* test *is designed to bring within such legislation "persons and working relationships which, prior to this Act, were not deemed to fall within an employer- employee category."* [1]

1. (226) See Rutherford, 331 U.S. at 729; see also Whitaker House, 366 U.S. at 31–32 (describing the same as it relates to homeworkers).]

What was the "focus" and "ultimate Concept" behind the Test?

The focus and ultimate concept was the Economic Dependence of the alleged employee.

(228) See also Pilgrim Equip., 527 F.2d at 1311– 12 ("[T]he final and determinative question must be whether the total of the testing establishes the personnel are so dependent upon the business with which they are connected that they come within the protection of [the] FLSA or are sufficiently independent to lie outside its ambit.'')

The statutory language thus frames the central question that the economic reality test asks—*whether the worker is economically dependent on an employer who suffers or permits the work* *or whether the worker is in business for themselves.*

To aid in answering this ultimate inquiry of economic dependence, several factors have been considered by courts and the Department as particularly probative when conducting a totality-of-the-circumstances analysis of whether a worker is an employee or an independent contractor under the FLSA. *[1]*

1. (229) See, e.g., Flint Eng'g, 137 F.3d at 1441 (explaining that "[n]one of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach")]

How long have the factors noted by the Supreme Court being used?

- The considerations identified by the Supreme Court during the *Silk and Rutherford cases* are the same factors that the Department set forth in its NPRM. Courts, employers, workers, and enforcement personnel have been considering these factors for over 75 years. [Review slide 24]
- As such, the Department does not see a credible basis for comments that predict sharply increased litigation, dramatic curtailment of opportunities, or massive reclassification of workers. The Department's position have remained remarkably consistent since the 1940s, and throughout this time the test has demonstrated its ability to address evolving workplace trends.
- The courts have applied this concept for more than seven (7) decades to classify workers under the Act, and the predictions raised in the comments as concerns have not been evident. All of the federal courts of appeals that have addressed employee or independent contractor status under the FLSA consider five of the same factors. [1]
- These factors are only guideposts, and "[i]t is dependence that indicates employee status. Each [factor] must be applied with that ultimate notion in mind. This is why most courts, and the Department, have long made clear that additional factors may be relevant when applying the test to a particular case.

1. (241) Superior Care, 840 F.2d at 1058–59; DialAmerica, 757 F.2d at 1382–83; McFeeley, 825 F.3d at 241; Off Duty Police, 915 F.3d at 1055; Lauritzen, 835 F.2d at 1534–35; Alpha & Omega, 39 F.4th at 1082; Driscoll, 603 F.2d at 754–55; Paragon, 884 F.3d at 1235; Scantland, 721 F.3d at 1311–12; Morrison, 253 F.3d at 11

How are the factors identified to be applied?

Each factor is examined and analyzed in relation to one another and to the Act's definitions. Each factor, considered in isolation, does not determine whether a worker is economically dependent on an employer for work or in business for themself. Rather, the factors are tools or indicators and must be analyzed together in order to answer this ultimate inquiry.

The totality-of-the circumstances analysis considers all factors that may be relevant and, in accordance with the case law, does not assign any of the factors a predetermined weight.

Outcomes may vary somewhat among workers even in the same profession, for example, because the test demands a fact-specific analysis.

Depending on the facts and circumstances of a case, it is to be expected that one or more factors may be more probative than the other factors. It is also possible that not every factor will be particularly relevant in each case and that is also to be expected. [1]

1. (245) See, e.g., **Lauritzen, 835 F.2d at 1534** (referring to the economic reality factors and stating that "[c]ertain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling.")

***"[n]one of the factors identified is determinative on its own, and each must be considered with an eye toward the ultimate question*— the worker's economic dependence on or independence from the alleged employer." 2**

2. (236)See Off Duty Police, 915 F.3d at 1055 (alterations and internal quotations omitted)]

Limiting and weighting the factors in a predetermined manner undermines the very purpose of the test, which is to consider—based on the economic realities—whether a worker is economically dependent on the employer for work or is in business for themself. [3]

3. (243)See, e.g., Scantland, 721 F.3d at 1312 (quoting Mednick, 508 F.2d at 301–02); see also Saleem, 854 F.3d at 139–140; Mr. W Fireworks, 814 F.2d at 1054–55]

WHAT HAPPENS WHEN CERTAIN RELEVANT FACTS OVERLAP AMONG THE FACTORS?

- The Department believes that emphasizing the discrete nature of each particular factor and evaluating each factor in a vacuum fails to analyze the entire range of potential employment relationships in the manner demanded by the Act's text and accompanying case law.
- Additionally, the test must be able to identify the vast variety of legitimate independent contractor relationships. [1]
- As such, the Department does not wish to be overly prescriptive regarding overlap among factors, because doing so encourages a more formulaic application of the factors as a checklist, when instead the factors are guides to determining, by looking at all relevant facts, the economic reality of the situation.
- Applying a formulaic or rote analysis that isolates each factor is contrary to decades of case law, decreases the utility of the economic reality test, and makes it harder to analyze the ultimate inquiry of economic dependence.
- Rather, the analysis needs to be flexible enough to apply to all kinds of work, and all kinds of workers, from traditional economy jobs to jobs in emerging business models.

As the Supreme Court stated in Silk, "[p]robably it is quite impossible to extract from the [SSA] a rule of thumb to define the limits of the employer-employe[e] relationship" but the Court identified factors as "important": "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation[,] and skill required in the claimed independent operation" and added that "[n]o one is controlling, nor is the list complete." *[(247) See Silk, 331 U.S. at 716]*

1. (246) Independent contractors are not "employees" for purposes of the FLSA. See generally Portland Terminal, 330 U.S. at 152 (stating that the "definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees")

Can the factors be conducted like a scorecard or a checklist?

- The analysis, however, cannot be conducted like a scorecard or a checklist.
- For example, two factors that strongly indicate independent contractor status in a particular case could possibly outweigh other factors that indicate employee status, and vice versa.
- But to assign a predetermined and immutable weight to certain factors ignores the totality-of-the circumstances, fact-specific nature of the inquiry that is intended to reach a multitude of employment relationships across occupations and industries and over time.
- Similarly, it is possible that not every factor will be particularly relevant in each case and that is also to be expected. [1]

1. (245) See, e.g., **Lauritzen, 835 F.2d at 1534** (referring to the economic reality factors and stating that "[c]ertain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling.")]

Can the factors be conducted like a scorecard or a checklist? [Cont.]

NO

- The Department believes that emphasizing the discrete nature of each particular factor and evaluating each factor in a vacuum fails to analyze the entire range of potential employment relationships in the manner demanded by the Act's text and accompanying case law.
- Additionally, the test must be able to identify the vast variety of legitimate independent contractor relationships.[1]
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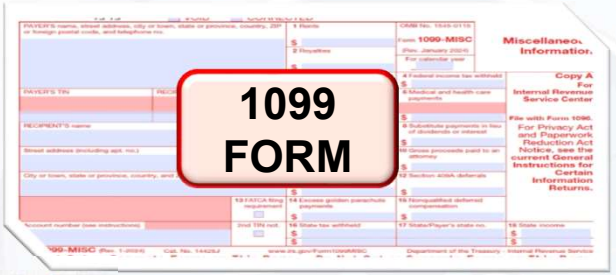
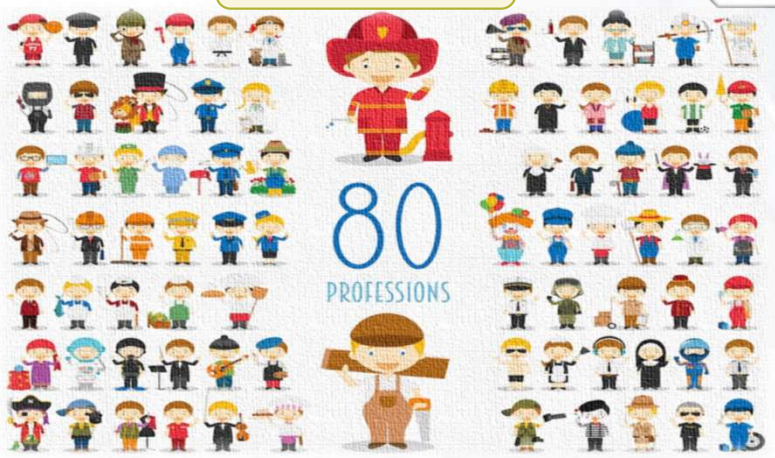
1. (246) Independent contractors are not "employees" for purposes of the FLSA. See generally Portland Terminal, 330 U.S. at 152 (stating that the "definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees").

What factors are NOT PROBATIVE of the economic realities of the relationship?



Job Titles



Dependence on income or subsistence *[86 FR 1178]*

Are the factors well-suited to the modern economy?

- Some comments stated that the proposed rule was not well-suited to the modern economy, the department disagrees.
- The Department notes that the cases addressing employee vs. independent contractor status discussed in this rule and using the economic reality test apply to a wide range of today's workers, from cable installers to exotic dancers to health care workers, and the Department's enforcement experience applying the economic reality test is similarly varied.
- With this rulemaking, the Department describes the economic reality factors that reflect the totality-of-the-circumstances approach that courts have taken for decades and are still applying to today's workplaces and provides an analysis as to how the Department considers each factor in today's workplaces, based on case law and the Department's enforcement expertise in this area.

What feedback did stakeholders provided on DOLs recommendations for §795.110?

"[c]ourts have interpreted the FLSA's broad suffer or permit to work language as seeking to answer one foundational question regarding the relationship between a worker and the entity to whom that worker provides their labor."

They added that the 2021 IC Rule "improperly elevates certain factors and prevents consideration of certain facts, would invite employers to find ways to cloak a worker's dependence in a veneer of independence and would fail to account for changes in working structures that come with societal progress."

https://thelafed.org/

https://www.twu.org/

"will ensure that the legal line between those realities matches the facts on the ground. The six-factor test envisioned in this rule accurately reflects the everyday relationship between workers and their employers. None of our members would risk becoming independent contractors under this rule (as they would have under the previous administration's proposal)."

"will achieve more certainty than the January 2021 Rule because it reflects a standard that the courts have clarified and explained in numerous specific contexts through decades of judicial rulings. It is a well understood body of law that employers, workers, enforcement officials, private attorneys, and the federal courts all have considerable experience applying."

https://www.swacca.org/

What feedback did stakeholders provided on DOLs recommendations for §795.110?

*"[The NPRM] properly establishes that the purpose of the **'economic reality'** factors is to inform and illuminate the **'economic dependence'** inquiry while no one factor independently drives the analysis."*

OUTTEN & GOLDEN

https://www.outtengolden.com/

*"[they] support returning to the longstanding six-factor balancing test, which will ensure certainty and clarity for construction employers and employees, **provide protection to law-abiding responsible contractors** and workers in the construction industry, and **reduce burdensome and costly litigation**."*

NECA — National Electrical Contractors Association

International Brotherhood of Electrical Workers

https://www.neca-ibew.org/

*"proposed rule's six factor 'economy reality' analysis is **a sengsible, totality-of-the-circumstances approach** that takes into account all relevant aspects of the worker's relationship with the hiring entity, **is not easily manipulated by employers, and is well-supported by Supreme Court and circuit court precedent.**"*

Shriver Center on Poverty Law

https://www.povertylaw.org/

*"[t}he Department of Labor is correct to note that it is **the totality of the circumstances that one must look at to properly determine status**" and observed that "courts have found that there is no **'rule of thumb'**, but that they must instead look at **'the total situation'**"*

sifma — Invested in America

https://www.sifma.org/

What did the ones opposing the change on §795.110 said? [Cont.]

Some commenters stated that the Department's proposed factors were too broad and not tethered to economic dependence.

"the proposed regulations "are not faithful to answering the question of economic dependence" and instead "consistently resolve alternative interpretations of a specific factor in the direction of broadening the scope of the factor."

IBA and CPIE

"to narrow the scope of the economic reality test and suggests an individual is not an employee only if the employee has a free-standing business"

BGM BOULETTE GOLDEN & MARIN

https://www.boulettegolden.com/

""would not only lead to significant reclassification of independent contractors but would also lead to a considerable increase in litigation. The bias in favor of employee status, which appears throughout the Proposed Rule, makes the risk that independent contractors would be misclassified as employees especially acute, with potentially dramatic consequences for entire industries."

NELP NATIONAL EMPLOYMENT LAW PROJECT

https://www.nelp.org/

Regarding the Department's explanations accompanying each factor, NELP commented that "[b]y sharpening the focus of each factor, the proposed rule provides greater clarity, which will encourage employer compliance and reduce misclassification while still enabling true independent contractors to run their businesses as they see fit."

"the Department's proposal expanded the range of relevant factors and "hold[s] a thumb on the analytical scale towards employment."

SHRM The Society for Human Resource Management

https://www.shrm.org/

U.S. Chamber of Commerce

https://www.uschamber.com/

What did the ones opposing the change on §795.110 said?

Several commenters objected to the Department's framing of the proposal as a return to a longstanding analysis, instead opining that the NPRM set forth a novel test. See, e.g., Mackinac Center for Public Policy; WPI. Many of these commenters expressed concern that the proposed rule would have detrimental effects on their industries, work opportunities, and earnings.

"[the Department's proposal to return to a] "totality-of-the-circumstances analysis, in which the economic reality factors are no longer weighted more heavily based on importance, represents a change from the 2021 Independent Contractor Rule that will inevitably bring uncertainty and confusion for advertising agencies and the U.S. business community at large."

https://www.aaaa.org/

"[b]y expanding the range of relevant factors and expressly refusing to give guidance on how to weigh them against each other, DOL actively undermines the clarifying improvements of the 2021 Rule and works against its own stated objectives."

FINANCIAL SERVICES INSTITUTE — VOICE OF INDEPENDENT FINANCIAL SERVICES FIRMS AND INDEPENDENT FINANCIAL ADVISORS

https://financialservices.org/

"[identifying aspects of the proposal] that "would be enormously economically disruptive to the local businesses and preferred livelihoods of these individuals"

ACLI

https://www.acli.com/

"[the proposal could] "[t]hreaten the source of income of thousands of workers across the country in a time of economic uncertainty"

PGA OF AMERICA 1916

https://www.pga.org/

("[B]y making it more expensive and more difficult to undertake independent work, this rule will shrink the available labor pool for employers."

THE BUCKEYE INSTITUTE

https://www.buckeyeinstitute.org/

What did the ones opposing the change on §795.110 said? [Cont.]

Other commenters stated that the 2021 IC Rule's core factor analysis was better suited to the issues of the current economy than the Department's proposal

"the Department's proposal "conflicts with the way America's economy works today" and that the new economy would be "significantly diminished" if the proposal were to move forward."

JCN FREEDOM FIGHTERS

https://www.jobcreatorsnetwork.com/

In contrast, other commenters stated that …

"accurately analyzes modern workplace trends and provides detailed guidance on how these changes to the nature of work itself must be integrated and considered within those six identified factors (and within the additional factors that may arise in particular factual scenarios)."

LA Fed & Teamsters Locals

"[the NPRM] "closely aligns with long-standing judicial precedent and that has proven well-suited to adapt to the myriad forms of working arrangements that have existed in the over 80 years since the FLSA's passage, as well as to unforeseeable work structures that will appear in the future")."

LCCRUL & WLC

How have the Supreme Court typically interpreted the FLSA?

- The Supreme Court's "decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right[s] . . . under the Act" and "have held that FLSA rights cannot be abridged by contract or otherwise waived." [1]
- First, the Court has determined, based on the legislative history of the FLSA, that the Act constituted "a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency." [2]
- According to the Court, the protective purposes of the Act thus "require that it be applied even to those who would decline its protections"; otherwise, "employers might be able to use superior bargaining power to coerce employees to . . . waive their protections under the Act."[3]

1. *(248) See Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981) (listing cases)]*
2. *(249) See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706 (1945)*
3. *(250)See Tony & Susan Alamo, 471 U.S. at 302 (citing Barrentine, 450 U.S. 728 and Brooklyn Sav., 324 U.S. 697)]*

How have the Supreme Court typically interpreted the FLSA? [Cont.]

- Second, in enacting the FLSA, Congress sought to establish a "uniform national policy of guaranteeing compensation for all work" performed by covered employees. [1]
- Consequently, "[a]ny custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage . . . cannot be utilized to deprive employees of their statutory rights."[2]
- Third, the Court has held that permitting employees to waive their FLSA rights is inconsistent with the explicit purpose of the Act to protect employers against unfair methods of competition.[3]
- Accordingly, FLSA rights cannot be waived by either party under the law.

1. *(251) See Jewell Ridge Coal Corp. v. UMWA Local 6167, 325 U.S. 161, 167 (1945)]*
2. (252) Id. (internal quotation marks omitted).
3. (253) 29 U.S.C. 202(a); Brooklyn Sav., 324 U.S. at 710].

What's the federal courts of appeals stance on the factors?

- As the 2021 IC Rule explained, *"[m]ost courts of appeals articulate a similar test,"* and these courts consistently caution against the *"mechanical application"* of the economic reality factors, view the factors as tools to "gauge . . . economic dependence," and "make clear that the analysis should draw from the totality of circumstances, with no single factor being determinative by itself."
- All of the federal courts of appeals that have addressed employee or independent contractor status under the FLSA consider five of the same factors. Nearly all federal courts of appeals expressly consider a sixth factor, whether the work is an integral part of the employer's business.
- The Fifth Circuit has not adopted the integral factor as an enumerated factor but has at times assessed integrality as an additional relevant factor. ***[(475) See, e.g., Hobbs, 946 F.3d at 836]***

What's the federal courts of appeals stance on the factors?

- As such, courts can and do accord weight to different factors depending upon the particular facts of a case.
- And because courts are the ultimate arbiter of disputes regarding worker classification, an analysis that is aligned with how courts view the issue is the most beneficial guidance that the Department can provide to stakeholders.
- As addressed in the NPRM, since Silk and Rutherford, federal courts of appeals have applied the economic reality test to distinguish independent contractors from employees who are entitled to the FLSA's protections.
- Federal appellate courts considering employee or independent contractor status under the FLSA generally analyze the economic realities of the work relationship using the factors identified in Silk and Rutherford. ***[(237) See generally supra n.52]***

Does the worker classification infringe upon worker's or business choices?

A number of commenters raised concerns about the question noted and stated that ……

"the result of the NPRM "will be that many workers— including workers who want to be independent contractors—will be reclassified as employees under the FLSA"

CAMBRIDGE Investment Research
https://www.joincambridge.com/

Transcend Software & Technology Solutions, LLC
https://transcendsoftware.net/

"the proposal would create an environment "where the freedom for entrepreneurs to operate as independent contractors is significantly diminished"

"it believes employers and workers should have the freedom and flexibility to engage in labor arrangements that meet the specific needs and preferences of both parties involved"

NDA

Cetera
https://cetera.com/

"the Department could take a huge step toward . . . certainty [for stakeholders] by including the expressed intention of the parties as a threshold criteria for the existence of economic dependence."

The department states that …

While businesses are certainly and unequivocally able to organize their businesses as they prefer consistent with applicable laws, and workers are free to choose which work opportunities are most attractive to them, if a worker is an employee under the FLSA, then those FLSA-protected rights cannot be waived by either party.

What's the Supreme stance on the FLSA Rule?

The Supreme Court's ***"decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right[s] . . . under the Act"*** and **"have held that FLSA rights cannot be abridged by contract or otherwise waived."** ***[See Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981) (listing cases)]***

The Supreme Court has identified at least three reasons for this nonwaiver rule and they are …

1

The Court has determined, based on the legislative history of the FLSA, that the Act constituted "a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency***." [See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706 (1945)]***

According to the Court, the protective purposes of the Act thus "require that it be applied even to those who would decline its protections"; otherwise, "employers might be able to use superior bargaining power to coerce employees to . . . waive their protections under the Act." ***[See 0Tony & Susan Alamo, 471 U.S. at 302 (citing Barrentine, 450 U.S. 728 and Brooklyn Sav., 324 U.S. 697)]***

2

In enacting the FLSA, Congress sought to establish a "uniform national policy of guaranteeing compensation for all work" performed by covered employees. ***[See Jewell Ridge Coal Corp. v. UMWA Local 6167, 325 U.S. 161, 167 (1945)]*** Consequently, "[a]ny custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage . . . cannot be utilized to deprive employees of their statutory rights.' ***[***Id. (internal quotation marks omitted)]

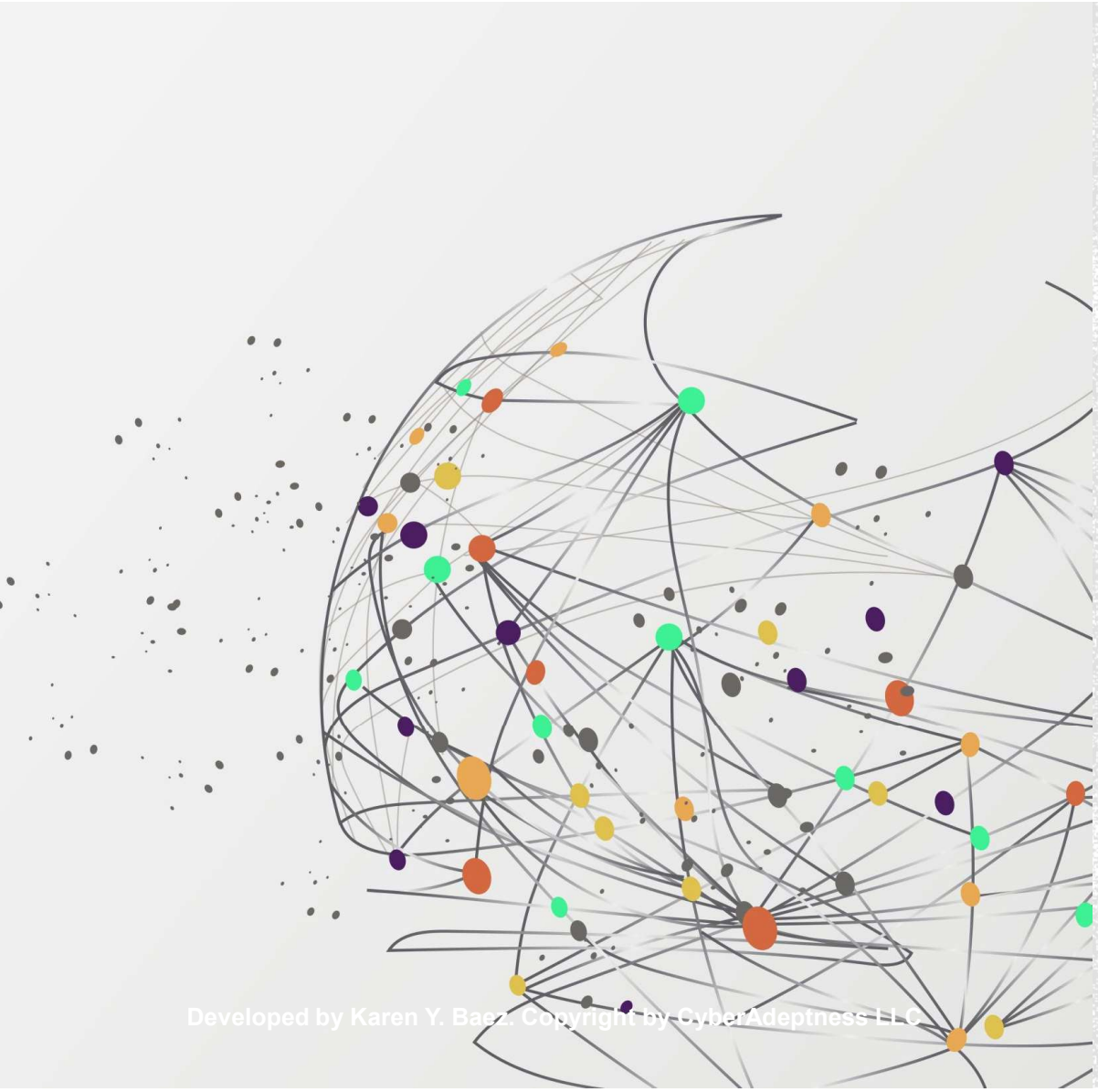
3

The Court has held that permitting employees to waive their FLSA rights is inconsistent with the explicit purpose of the Act to protect employers against unfair methods of competition. ***[See 29 U.S.C. 202(a); Brooklyn Sav., 324 U.S. at 710].*** Accordingly, FLSA rights cannot be waived by either party under the law.

What is the Departments stance after reviewing the comments?

The Department is adopting § 795.110 (a) as proposed.

- Regarding comments that the Department's proposal is generally biased in favor of employee status, or that its analysis of each factor places a "thumb on the scale" toward employment, the Department reiterates that its proposal is consistent with longstanding judicial precedent and, critically, the plain language of the Act.
- The Department believes that determining whether an employment relationship exists under the FLSA begins with the Act's definitions.
- While the Department appreciates, as some commenters noted, that two factors (like any test with fewer factors) are simpler in some ways than six factors, the Department believes that it would be a disservice to stakeholders to present an analysis that is contrary to how courts view the totality-of-the circumstances analysis.
- Courts have repeatedly admonished against a mechanical application of the factors and have required a full analysis of all relevant factors, which is why the Department believes that any clarity created by shrinking the test to two core factors and artificially weighting them is illusory.
- The Department is providing a detailed analysis about the application of each factor based on case law and the Department's enforcement experience as a guide for employers and workers in determining whether a worker is an employee or an independent contractor, with each factor discussed through the lens of economic dependence.

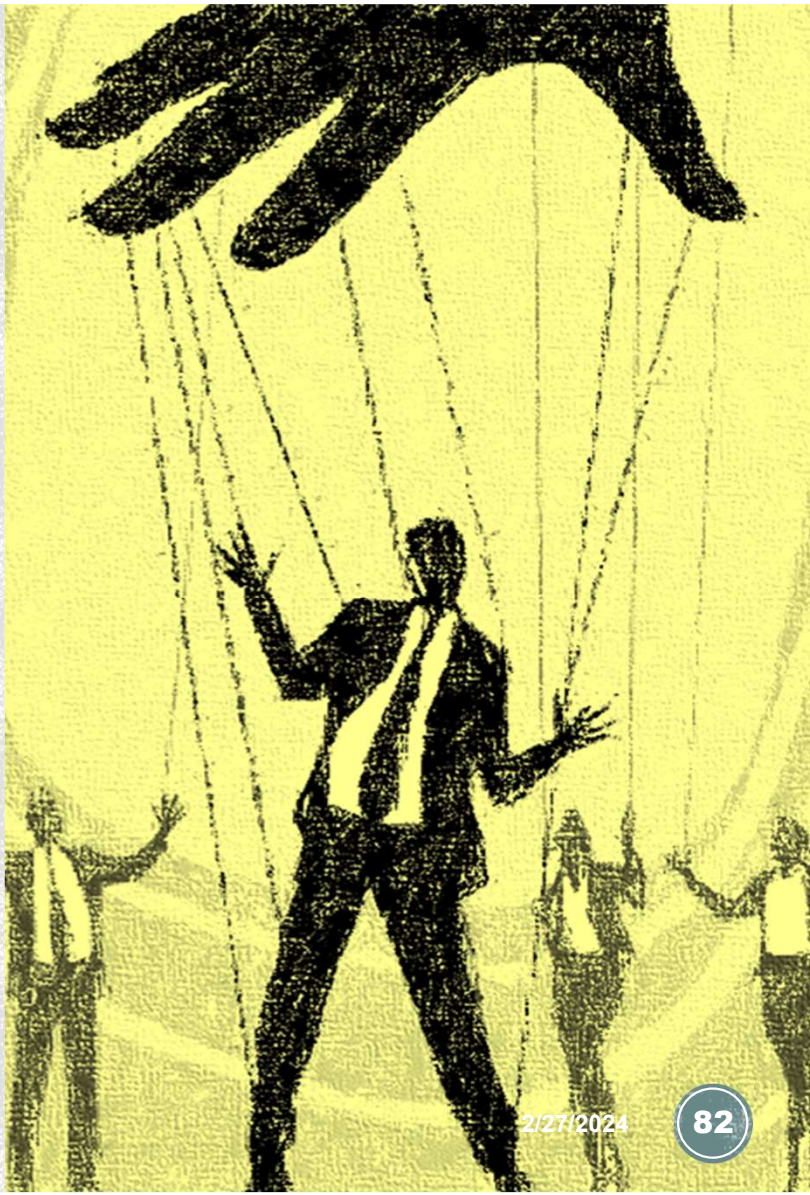


Opportunity for Profit or Loss Depending on Managerial Skill (§ 795.110(b)(1))

Overview

How did the 2021 IC Rule's addressed Control and Opportunity for Profit or Loss?

- The Department identified *"the nature and degree of control over the work"* as one of two core factors given *"greater weight"* in the independent contractor analysis.
- It elevated the two "core" factors above other factors, asserting that the two core factors have "greater probative value" in determining a worker's economic dependence. ***[(119) 87 FR 62227 (citing 86 FR 1246 (§ 795.105(c) and (d))).]***
- While the Department appreciates, as some commenters noted, that two factors (like any test with fewer factors) are simpler in some ways than six factors, the Department believes that it would be a disservice to stakeholders to present an analysis that is contrary to how courts view the totality-of-the circumstances analysis.
- Courts have repeatedly admonished against a mechanical application of the factors and have required a full analysis of all relevant factors, which is why the Department believes that any clarity created by shrinking the test to two core factors and artificially weighting them is illusory.



What determines the managerial skill factors use to determine profit or loss?

The Department proposed that this factor consider "whether the worker exercises managerial skill that affects the worker's economic success or failure in performing the work." The Department identified a nonexclusive list of facts that may be relevant when considering this factor:

1. Whether the worker determines or can meaningfully negotiate the charge or pay for the work provided.
2. Whether the worker accepts or declines jobs or chooses the order and/ or time in which the jobs are performed.
3. Whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work.
4. Whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space.

What further clarification is noted in regard to the profit or loss factor?

FOCUS OF RULE

Is on whether the worker exercises managerial skill that affects the worker's economic success or failure in performing the work.

This will also consider Investment as a separate factor.

- The Department added that, if a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee.
- The Department said further that *some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor*. ***[(254) See generally 87 FR 62274–75 (proposed § 795.110(b)(1))]***
- The Department explained that the proposed regulatory text for this factor *focused the opportunity for profit or loss factor on whether the worker exercises managerial skill that affects the worker's economic success or failure in performing the work*.
- The Department noted that the 2021 IC Rule similarly considered managerial skill but explained that *the proposed regulatory text more accurately reflects the consideration of the profit or loss factor in the case law and reflects the ultimate inquiry into the worker's economic dependence or independence*.
- The Department further explained that *many federal courts of appeals "apply this factor with an eye to whether the worker is using managerial skill to affect the worker's opportunity for profit or loss" and discussed that case law.*

Will Investment and Profit and Loss be considered as one or separate?

- The Department also noted that its proposal would *consider investment as a separate factor*, unlike the 2021 IC Rule's consideration of investment within its opportunity for profit or loss factor.
- The Department explained that *the proposed regulatory text stating that the fact that a worker has no opportunity for a loss indicates employee status is consistent with the overall inquiry into economic dependence and is supported by the case law.*
- Finally, the Department *discussed the case law and its prior guidance supporting its view that a worker's decision to work more hours (when paid hourly) or work more jobs (when paid a flat fee per job) where the employer controls assignment of hours or jobs is similar to decisions that employees routinely make and does not reflect managerial skill.* ***[(255) See generally id. at 62237–39]***

What did commenters supporting the discussion of profit and loss stated?

"highly applaud[ed] inclusion of 'managerial skill' in the title line and in the first sentence of the proposed" regulatory text and stated that "the exercise of managerial skill is a sine qua non of independent contractor status."

Smith Summerset & Associates LLC

https://www.smithwagehour.com/

LA Fed & Teamsters Locals

"that it is managerial skill that matters when analyzing whether a worker's earning ability is relevant to the employee status analysis" (emphasis omitted)

"a worker who has the power to make key business decisions that affect their opportunity for profit or loss is more likely to be an independent contractor than a worker who does not have power over these decisions."

Several commenters (including Farmworker Justice, NWLC, and the Shriver Center)

https://www.nelp.org/

NELP NATIONAL EMPLOYMENT LAW PROJECT

gale

https://galehealthcaresolutions.com/

"to explicitly tie the opportunity for profit or loss to a worker's managerial skill, not their ability to work longer" (emphasis omitted).

"We believe that the 2021 Rule may have opened additional opportunities for truckers to fall prey to lease-purchase schemes by stipulating that an individual only needed to exhibit exercise of initiative or management of investment for the factor to weigh towards the individual being an independent contractor. The formulation of the factor may have dismissed predatory leasing arrangements because an owner-operator otherwise exercised some initiative in the management of their work."

OWNER-OPERATOR INDEPENDENT DRIVERS ASSN. OOIDA

https://www.ooida.com/

What is commenters view on what reflects managerial skills?

The Department proposed that decisions to work more hours or take more jobs "generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor" *[Id. at 62274–75 (proposed § 795.110(b)(1))]*

"rejection of the proposition that a worker['s] decision to take additional hours or tasks indicates 'managerial skill.' "

IBT INDUSTRIAL SOLUTIONS™

https://ibtinc.com/

See also Leadership Conference, ROC United, UFCW.

"applaud[ed] the specific examples of managerial skill listed in the [proposal].'

Smith Summerset & Associates LLC

https://www.smithwagehour.com/

NATIONAL DOMESTIC WORKERS ALLIANCE

"a worker's ability to impact their pay by working more hours or taking more jobs does not show the exercise of managerial skill indicating independent contractor status."

https://www.domesticworkers.org/

REAL WOMEN IN TRUCKING

"this factor can appropriately indicate employee or independent contractor status for truck drivers and that the NPRM's "addition of relevant facts to consider under this factor . . . provides helpful context to differentiate between these scenarios."

https://www.realwomenintrucking.org/

"[c]orrectly, the proposed rule highlights whether the worker can meaningfully negotiate, accept or decline jobs, and engage in efforts to expand their independent business."

UFCW

https://www.ufcwpa.org/

What concerns commenters had about the managerial skill factor?

"UFCW cited agreements that it says are imposed by companies like Instacart, Uber, and Lyft that prohibit workers from connecting with or soliciting their customers and stated that "actively prohibit[ing] workers from developing an independent business is evidence of a lack of opportunity to profit or loss based managerial skill."

UFCW

https://www.ufcw.org/

"UFCW also stated that, "when black-box algorithms solely dictate their available work, pay, and other economic conditions," "[w]orkers are powerless to negotiate or make any managerial decisions."

The Department agrees that such facts would be probative of whether a worker has an opportunity for profit or loss depending on managerial skill but also reiterates that no one fact is dispositive under this factor.

'the mere fact that an individual purchases equipment or services from a business they work with does not necessarily indicate an employee relationship."

OOIDA

https://www.ooida.com/

OOIDA further explained that "[t]here are many owner-operators who choose to make purchases from the business they are leased to because it is a profitable deal" and provided an example involving a group discount on tires. OOIDA "believe[s] that the NPRM's totality-of-the-circumstances approach should be able to distinguish between these types of situations."

REAL WOMEN IN TRUCKING

"requested that the Department address "free market" load boards (load boards are matching systems where shippers post freights that they need carried and carriers post their availability), which, in the commenter's view, "offer an opportunity to control profit or loss (unlike internal load boards).'

https://www.realwomenintrucking.org/

The Department appreciates these concerns and agrees that the test put forth is flexible enough to account for a wide variety of situations, but *its intent in promulgating this final rule is to provide as much as possible a general standard for determining employee or independent contractor status.* The requested guidance is technical and industry-specific and is better addressed outside of rulemaking after this final rule takes effect.

What other recommendations commenters provided?

"recommended adding "depending on managerial skill" to the third sentence of the regulatory text so that it reads: "If a worker has no opportunity for profit or loss depending on managerial skill, then this factor suggests that the worker is an employee."

Smith Summerset & Associates LLC
https://www.smithwagehour.com/

The commenter stated that, "[w]ithout the managerial skill qualifier, the reader is invited to quickly think of working more or fewer hours as an opportunity for profit or loss."

However, the subsequent sentence in the regulatory text addresses working more hours. Moreover, the intent of the third sentence is to explain that, where a worker who has no opportunity for profit or loss, this factor indicates employee status. Qualifying that explanation with a reference to managerial skill is unnecessary, because regardless of managerial skill, the worker's lack of an opportunity for profit or loss points this factor toward employee status.

"worker who can experience 'profit' with no attached risk of business loss is not truly in business for themselves," and suggested that the following language from the NPRM preamble be added to the regulatory text: "The fact that a worker has no opportunity for a loss indicates employee status. Workers who incur little or no costs or expenses, simply provide their labor, and/or are paid hourly, piece rate, or flat rate are unlikely to experience a loss. This factor suggests employee status in those circumstances."

However, the third sentence of the regulatory text already explains that this factor indicates employee status where a worker has no opportunity for a loss.

National Employment Lawyers Association
https://www.nela.org/

NELA further suggested that the Department should "incorporate the flip side" of its above suggestion and state that "the chance for a 'loss' with no corresponding opportunity for profit is a sign of dependence on the employer, which points toward employee status."

Again, the third sentence of the regulatory text already covers circumstances where the worker has "no opportunity for a profit or loss."

What other recommendations commenters provided?

NELA also suggested that the following language be added to the regulatory text: "The fact that an employer may impose fines, penalties, or chargebacks on a worker for faulty performance does not mean that the worker may experience a loss. These kinds of costs are likely to make workers more dependent on their employers, and therefore more like employees."

- The first sentence is from the NPRM preamble, and the second sentence is new language suggested by NELA.
- The Department declines to add this language to the regulatory text.
- The Department notes that although fines, penalties, and chargebacks can indicate a worker's economic dependence on the employer, whether they indicate dependence may depend on the circumstances.

"NELA additionally suggested changing the regulatory text identifying accepting or declining jobs as a relevant factor so that it would read: "whether the worker exercises managerial skill in accepting or declining jobs without employer input or chooses the order and/or time in which the jobs are performed independent from employer control."

- In the Department's view, however, adding a reference to "managerial skill" is unhelpful because accepting or declining jobs is an underlying fact that is relevant to determining whether the worker exercises managerial skill.
- And adding references to "employer input" and "employer control" are unnecessary because the focus of this factor is whether the worker has an opportunity for profit or loss through managerial skill, and there are many aspects of accepting/declining jobs and choosing the order/time to perform jobs—not only "employer input" and "employer control"—which may shed light on whether those decisions and choices exemplify managerial skills.

What other recommendations commenters provided?

Finally, NELA suggested adding two sentences to the regulatory text. The first sentence would read: "A worker's technical proficiency in completing each job is not the type of managerial skill that would indicate independent contractor status."

- This suggested sentence is, in the Department's view, correct in the abstract. As the Department explained in the NPRM, "where a worker is paid by the job, the worker's decision to work more jobs and the worker's technical proficiency in completing each job are not the type of managerial skill that would indicate independent contractor status under this factor." *[Id. at 62238; see also Scantland, 721 F.3d at 1316–17.]*
- However, the Department also identifies in the regulatory text instances of managerial skill, such as efforts to expand a business or secure more work, hiring others, and purchasing materials and equipment, that can affect a worker's opportunity for profit or loss by, at least in part, increasing the worker's technical proficiency.
- The focus of this factor should be the degree of managerial skill, and the Department does not believe that adding a blanket statement regarding technical proficiency to the regulatory text would be helpful because doing so could distract from evaluating managerial skill.
- Technical proficiency in completing a job, even if it affects a worker's earnings, is alone insufficient for this factor to indicate independent contractor status, but, ultimately, whether that technical proficiency is the product of managerial skill is probative of employee or independent contractor status.

NELA

NELA's second suggested sentence would read: "Managerial skill will typically affect opportunity for profit or loss beyond a given job, and will relate to the worker's business as a whole."

The Department believes that the second suggested sentence is not necessarily probative of this factor and is not a point emphasized in the case law.

What were items commenters opposed, disagreed, or requested changes on?

Numerous commenters opposed, disagreed with, and/or requested changes to or clarifications of the proposed opportunity for profit or loss depending on managerial skill factor. For example, several commenters raised concerns that certain of the facts in the nonexclusive list of facts identified by the Department as relevant to this factor cannot be satisfied in their particular industries.

"[i]n home care, independent contractor clinicians cannot hire other workers for the purposes of completing the contracted jobs (i.e., patient visits) they have accepted from the home care agency" because of "stringent human resources and patient care regulations from both state and federal regulatory agencies." It added that workers "purchase and maintain their own equipment," but if the worker "accepts a specialized patient job, for instance a wound care patient, then the home care agency must purchase and provide to the independent contractor clinician the appropriate wound care supplies . . . as ordered by the physician."

https://www.tahch.org/home

ACLI

https://www.acli.com

"[w]ithout question, [insurance agents'] profit or loss depends upon their own managerial skill," but "insurance regulations, including New York Insurance Law § 4228, set strict limits on the commissions that insurers can pay to agents, who are "unable to negotiate or change their commission structure." **And although it "generally supports the Department's proposed application" of this factor, the American Securities Association expressed concern that this factor "globally suggests, without any exceptions, that 'whether the worker determines or can meaningfully negotiate the charge or pay for the work provided' is a relevant factor." Because "insurance and financial services regulations . . . set strict limits on the premiums that can be charged to customers and on the commissions that can be paid to agents and advisors," it asserted that financial professionals would not be seen as independent under this factor.**

What were items commenters disagreed or needed clarification on? [Cont.]

Numerous commenters opposed, disagreed with, and/or requested changes to or clarifications of the proposed opportunity for profit or loss depending on managerial skill factor. For example, several commenters raised concerns that certain of the facts in the nonexclusive list of facts identified by the Department as relevant to this factor cannot be satisfied in their particular industries.

"[suggested that the Department] "eliminate from consideration whether the worker can meaningfully negotiate his or her pay from the list of potentially relevant facts under this factor," include a carveout, or "clarify that a brokerage firm establishing prices to meet regulatory supervision obligations or considerations of its registered representatives does not create an employee relationship and is at most a neutral factor."

https://www.americansecurities.org/

"[suggested that the NPRM] "improperly presumes that independent contractors must have a staff and a marketed 'business' to 'manage.' " It stated that "many independent contractors deliberately offer their services to employers of their choosing for the express purpose of avoiding negotiating costs" and "do not want to run a business that requires overhead for services, advertising and hiring support staff." It added that "[i]t should be made clear that a worker who does solicit work from multiple clients remains an independent contractor."

https://www.abc.org

https://www.calchamber.com/

"expressed concern "that this factor would weigh against a gig worker being an independent contractor simply because the company for which they perform work sets pricing."

After reviewing the comments, what's the departments stance?

The Department adopts its proposed list of facts that may be relevant when applying this factor. The list is plainly nonexclusive, and neither any fact listed nor this factor will be dispositive of a worker's status. **As the regulatory text provides, "no one factor or subset of factors is necessarily dispositive," and the "outcome of the analysis does not depend on isolated factors but rather upon the circumstances of the whole activity."** ***[8 29 CFR 795.110(a)(1)–(2)].*** **The status of the workers identified by these comments will be determined by multiple facts bearing on their work relationships, and accordingly, these commenters' concerns do not reflect how the Department's analysis will be applied.**

Consistent with a totality-of-the circumstances analysis, not hiring others and not advertising, for example, do not make the worker an employee or even conclusively determine that this factor indicates employee status. (And as discussed below, certain decisions to "not" take business actions such as those listed in the regulatory text may be as indicative of managerial skill as decisions to take those business actions.) In that same vein, *soliciting work from multiple clients, for example and while of course relevant, does not guarantee that a worker is an independent contractor or even that this factor points to independent contractor status.*

The Department believes that the nonexclusive list of facts that are potentially relevant to this factor provides helpful guidance, as other commenters have stated. And even if a particular fact is not probative or always points in one direction for a particular worker in a particular industry, that does not mean that the fact is not probative on a general level.

"[commented that the Department does] not define what constitutes marketing and advertising" (one of the listed facts) and asked: "What, specifically, must we do to satisfy your definition of marketing and advertising?"

https://fightforfreelancersusa.com/

The Department believes that the terms "marketing" and "advertising" are well understood, and engaging in marketing or advertising are just examples of types of managerial skill that may be relevant when applying this factor. No worker needs to "satisfy" any of these facts; all facts relevant to the worker's opportunity for profit or loss depending on managerial skill should be considered.

Will the department use "exercises" instead of "opportunities" to emphasize worker profit or loss?

"[Although the U.S. Chamber agreed that the facts listed in the regulatory text are] "relevant to whether workers are independent contractors or employees," it stated that the NPRM was "wrong to require a worker to 'exercise' these decisions to exemplify independent contractor status."

Analogizing to the NPRM's discussion of how reserved rights can be relevant in addition to actual practice, the U.S. Chamber asserted that "the more important question is whether the worker has the opportunity to impact their profits and losses by engaging in various activities such as working for other companies, regardless of whether the worker actually acts on that opportunity.'

https://www.uschamber.com/

CWI

See also N/MA; NRF & NCCR.

"[criticized the NPRM for, in its view,] "requir[ing] consideration of whether the worker actually exercises his skill to impact economic success." and asserted that the NPRM "consistently references 'opportunity,' not actual exercise of that opportunity, as the relevant touchstone" and added that: "Whether a worker chooses to exercise the opportunities for profit and loss available to him is fundamentally his own business decision. It is the ability to follow that business judgment—even to his detriment—that is the hallmark of the independence he is afforded."

- Having considered the comments on this point, *the Department is revising the final regulatory text to emphasize the worker's "opportunities" for profit or loss based on managerial skill and to delete the reference to whether the worker "exercises" managerial skill.*
- The Department concurs that the term "opportunities," which encompasses opportunity more broadly than "whether the worker exercises managerial skill," is more consistent conceptually with the case law analyzing this factor and with the remainder of the regulatory text.
- Although the Department did not intend for the "exercises managerial skill" language to be limiting, focusing on "opportunities" should capture the facts relevant to a worker's profit or loss and managerial skill, as explained further in the discussion of comments in the following paragraph.

What comments triggered changed?

"stated that "[m]any independent contractors offer their services to select employers for the express purpose of avoiding negotiating costs for services, advertising, and hiring support staff," and that the NPRM "utterly fails to account for workers' preference for having an independent contractor relationship that avoids these costs." The commenter asserted that this "framework would virtually always weigh in favor of employment status."

The Coalition of Business Stakeholders

NRF & NCCR

"the fact that someone might not engage in certain practices or take on certain risks that would further impact the level of profit or loss should not result in a finding that the individual is not an independent contractor, unless that person is prevented from doing so by the entity with whom the individual contracts." According to the commenter, for example, "[a] carpenter or plumber who chooses to market through word of mouth and to complete one job at a time, and not hire helpers and make the investments necessary to work on multiple job[s] simultaneously, is no less an independent contractor than a carpenter or plumber who has made different choices about how to operate his or her business."

- The Department believes that *the opportunity*, for example, *to hire others or purchase materials and equipment, and a decision to not take such action based on a consideration of possible costs and rewards, can indicate managerial skill*. For this to be the case, the worker *must have a real opportunity to take the action and make an independent business decision indicating managerial skill* to not take the action.
- In other circumstances, not taking an action may not indicate managerial skill. For example, *if the action requires approval from the employer* (for example, *the employer must approve any person hired by the worker as a helper*) *or the action is not feasible financially* (for example, the worker is lower-paid and cannot hire others or make purchases), then there is likely no opportunity for the worker to make an independent business decision indicating managerial skill.
- Regardless, *no one action or lack of action should determine whether this factor indicates employee or independent contractor status;* the Department identifies in the regulatory text a number of possibly relevant facts, and other relevant facts may be considered too.

What comments triggered changed?

Several commenters expressed concern that the mention of "managerial skill" in the proposed regulatory text did not include references to "initiative," "business acumen," and "judgment."

"[Stated that] the proposed regulatory text "narrows the inquiry" as compared to the 2021 IC Rule, which referenced "business acumen or judgment" in its discussion of this factor. CWI further stated that the NPRM's preamble "acknowledge[d] that 'initiative,' 'business acumen,' and 'judgment' are informative of the opportunity-forprofit-or-loss factor" (citing 87 FR 62238). CWI requested that the Department "retain the 2021 IC Rule's formulation of the standard."

CWI

See also N/MA

"the proposed regulatory text "wrongly narrows the inquiry to 'whether the worker exercises managerial skill,' as opposed to 'managerial skill or business acumen or judgment,' as stated in the 2021 IC Rule."

U.S. Chamber of Commerce

https://www.uschamber.com/

- The Department did not intend to exclude initiative, judgment, or business acumen from the inquiry under this factor.
- The NPRM's preamble explained that considering initiative and judgment is very similar to considering managerial skill. [1]
- Accordingly, in light of the comments and the discussion of managerial skill in the NPRM's preamble and the cases cited therein, *the Department is modifying the regulatory text to clarify that managerial skill includes "initiative or business acumen or judgment.*
- Thus, with this change and the change discussed above, the first sentence of the regulatory text for this factor reads: *"This factor considers whether the worker has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker's economic success or failure in performing the work."*

1. (260) 87 FR 62238 (citing, inter alia, Franze, 826 F. App'x at 76–78; Flint Eng'g, 137 F.3d at 1441; Superior Care, 840 F.2d at 1058–59; Snell, 875 F.2d at 810)

What comments triggered changed?

Coalition to Promote Independent Entrepreneurs
https://iccoalition.org/

"[commented that, although earlier court decisions "properly considered an individual's opportunity for loss in evaluating the individual's economic dependence," the U.S. economy has changed, and "[t]here are countless numbers of individuals today who operate thriving businesses with their laptop computers and incur no risk of loss whatsoever." The commenter asserted that "[t]he fact that these individuals operate a type of business that does not require a substantial financial investment should not deny them their right to offer their services as independent contractors."

- Having considered this comment, *the Department stands by its position that "the fact that a worker has no opportunity for a loss indicates employee status."*
- The Department believes that the risk of a loss as a possible result of the worker's managerial decisions indicates that the worker is in business for themself.
- *Although a worker need not experience a loss or even likely experience a loss for this factor to indicate independent contractor status, the scenario presented by the commenter—"no risk of loss whatsoever"—does not suggest that the worker is an independent contractor because at least some risk of a loss is inherent in operating an independent business.*
- Moreover, *the Department's position is grounded in the case law, which has recognized that the lack of possibility of a loss indicates employee status. [1]*
- The Department notes, however, *that whether the worker in the scenario presented by the commenter is an employee or independent contractor depends on application of all of the factors and a consideration of the totality of the circumstances because neither this factor nor any other factor is necessarily dispositive.*
- Thus, *workers "who operate thriving businesses with their laptop computers and incur no risk of loss whatsoever" (the scenario presented by the commenter) may be employees or independent contractors depending on all of the factors.*

1. **(262) Id. at 62239** (citing Off Duty Police, 915 F.3d at 1059; Flint Eng'g, 137 F.3d at 1441; Selker Bros., 949 F.2d at 1294; Snell, 875 F.2d at 810; Lauritzen, 835 F.2d at 1536; DialAmerica, 757 F.2d at 1386)]

What concerns commenters had about areas deemed not representative of managerial skills?

A number of commenters expressed concerns with and/or sought changes to the last sentence of the regulatory text: "*Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor*."

"each decision by a "driver to accept or reject an opportunity (in this case, a load) is a business decision that affects his/her economic success" and "involves the weighing of an opportunity cost" (i.e., "the cost of accepting that load versus the revenue to be earned and also against the foregone opportunity to transport a different load"). NHDA further stated that, for these reasons, this sentence "is misleading and susceptible to short-circuiting a proper analysis."

Scopelitis Transportation Consulting
https://www.scopelitisconsulting.com/

National Home Delivery Association
Advancing Delivery & Set-Up of Bulky Goods
https://www.nationalhomedeliveryassociation.com/

flex
https://flex.com/

"Flex described this sentence as "misleading" and "likely lead[ing] to the discounting of evidence that is, in fact, highly relevant to a worker's 'opportunity for profit or loss depending on managerial skill.' " It stated that, "[i]f a cashier at a fast-food restaurant voluntarily chooses to work overtime or pick up an additional shift, that decision would not support independent contractor status[,]" but if a driver "who was planning to drive clients five days one week is solicited by a new client for a lucrative opportunity on Saturday, the decision to accept that new client and work an extra day is plainly an entrepreneurial decision that reflects managerial decision making."

Flex explained that "technological advances . . . have facilitated independent contractors' ability to quickly determine what earnings opportunities and hours worked will yield for them the biggest return on the investment of their time."

What concerns commenters had about areas deemed not representative of managerial skills?

"[t]he economic reality is that a worker who can profit by taking other jobs is more independent—and therefore less economically dependent on the employer—than an employee who cannot," and that "[t]he ability to make that choice should point to an independent relationship."

The Society for Human Resource Management

https://www.shrm.org/

- Having considered these comments, the *Department believes that the last sentence of the proposed regulatory text for this factor can be more precise.*
- In the NPRM, the Department explained this concept as follows: *"a worker's decision to work more hours (when paid hourly) or work more jobs (when paid a flat fee per job) where the employer controls assignment of hours or jobs is similar to decisions that employees routinely make and does not reflect managerial skill." [87 FR 62239]*
- The proposed regulatory text, however, *did not account for payment for the hours and jobs at a fixed rate or the employer's control over the flow of work.* The NPRM recognized that courts have held that a worker's ability to freely choose among jobs based on the worker's assessment of the comparable profitability of those jobs can indicate independent contractor status when applying the opportunity for profit or loss factor. [1]
- Other cases relied on by the Department in the NPRM involved workers who were paid at set or fixed rates and/or situations where more work was dictated by the employer's needs as opposed to the worker's initiative. [2]

1. (264) Id. (citing Karlson v. Action Process Serv. & Private Investigations, LLC, 860 F.3d 1089, 1095 (8th Cir. 2017)); Express Sixty-Minutes, 161 F.3d at 304)
2. (265) Id. (citing Off Duty Police, 915 F.3d at 1059; Scantland, 721 F.3d at 1316–17; Capital Int'l, 466 F.3d at 308; Snell, 875 F.2d at 810)]

What concerns commenters had about areas deemed not representative of managerial skills?

- Based on the comments, the discussion in the NPRM, and the case law, *the Department is revising the last sentence of the opportunity for profit or loss factor.* In the NPRM, that sentence read: *"Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor."*
- As revised, that sentence reads (with the new language in italics): "Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs *when paid a fixed rate per hour or per job*, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor."
- The Department also *considered adding to the regulatory text a reference to the employer's control of assignment of the hours or jobs*.
- Although such control may be relevant in this context, *the Department believes that the fact that the hours or jobs are paid at a fixed rate is more indicative that the worker is not exercising managerial skill by taking more such hours or jobs.*

"[t]he Department's commentary even cites authority noting that choosing among 'which jobs were most profitable' is evidence of independent contractor status, but the Proposed Rule contains no similar nuance."

CWI See also U.S. Chamber; MEP.

What is the departments take on working longer or taking other jobs?

- **Fight for Freelancers asserted that there was a conflict between this provision regarding working more hours or jobs and the provision stating that accepting or declining jobs can be a relevant fact when applying this factor.**
- **The Coalition of Business Stakeholders commented that the NPRM is "unclear on whether, when assessing the opportunity for profit or loss factor, a worker's ability to accept or decline work weighs in favor of independent contractor status."**

- The Department believes *these comments overlook the totality-of-the-circumstances nature of the analysis;* there is no particular factor to satisfy.
- In addition, the text addresses two concepts that are not in conflict.
- The last sentence of the regulatory text (as revised) addresses a worker who can earn more by working more hours or taking more jobs. *That worker is working more to earn more but not exercising managerial skill* (at least in that regard).
- On the other hand, *a worker may be able to accept and decline jobs where the jobs have varying degrees of potential profitability*, and *the worker must determine which jobs to pursue and how much of the worker's time and resources should be devoted to the various jobs*. That worker is exercising managerial skill (at least in that regard), which weighs in favor of independent contractor status.

"managerial skill should be broadly defined" and that "managerial skill should include an individual's ability to complete the work more efficiently or effectively."

MEP National Network™

https://mepnnams.com/

"[commented] that, although it "recognizes that merely working longer hours or more efficiently does not distinguish an independent contractor from an employee," "[a]n individual who uses initiation or judgment to perform a job more efficiently can generate greater profits, even if compensated by the hour or by piecework rates."

WFCA suggested that "depending on managerial skill" be stricken from the title of this factor and that the first sentence of the regulatory text be revised to state: *"This factor considers whether the worker exercises managerial skills, implements innovations, or uses other entrepreneurial concepts that affects the worker's economic success or failure in performing the work."*

WORLD FLOOR COVERING ASSOCIATION

https://wfca.org/

Is being innovative and acting entrepreneurially equates to managerial skills?

- For the reasons explained in the NPRM and in this section, *managerial skill is properly the focus of the opportunity for profit or loss factor because it helps to distinguish between decisions that affect a worker's earnings and the use of initiative, judgment, or business acumen that may create opportunities for profit or loss*.
- As further explained in the NPRM, *whether the worker's opportunity for profit or loss depends on managerial skill* (or initiative or judgment as discussed above) *is ingrained in the case law*. [1]
- Accordingly, striking "depending on managerial skill" would not be supported. And *although being innovative and acting entrepreneurially are synonymous with managerial skill, implementing innovations and using entrepreneurial concepts are not necessarily synonymous with the worker's managerial skill* if those innovations and concepts are developed and perfected by others.

1. **(266) 87 FR 62237–38** (citing, inter alia, Franze, 826 F. App'x at 76–78; Razak, 951 F.3d at 146; Verma, 937 F.3d at 229 (citing Selker Bros., 949 F.2d at 1293); Off Duty Police, 915 F.3d at 1059; Iontchev v. AAA Cab Serv., Inc., 685 F. App'x 548, 550 (9th Cir. 2017); McFeeley, 825 F.3d at 241 (citing Capital Int'l, 466 F.3d at 304–05); Keller, 781 F.3d at 812; Scantland, 721 F.3d at 1312; Flint Eng'g, 137 F.3d at 1441; Snell, 875 F.2d at 810; Superior Care, 840 F.2d at 1058–59; Lauritzen, 835 F.2d at 1535; Driscoll, 603 F.2d at 754–55)

"suggested language would detract the focus from, and not necessarily be consistent with, managerial skill. In addition, WFCA provided examples of workers who can "install complex wood or tile patterns" and requested that implementing "new techniques or innovations" and developing "specialized or unique skills" be added to the nonexclusive list of facts that may be relevant when applying this factor."

WORLD FLOOR COVERING ASSOCIATION https://wfca.org/

However, as discussed in this section, *implementing techniques or innovations is not necessarily indicative of managerial skill and may instead relate more to how the worker performs the work*. The same may be said about developing skills; especially considering the examples provided by WFCA, *these skills seem more about performing particular work.*

As discussed above in response to NELA's comment that *technical proficiency in completing each job is not managerial skill indicative of independent contractor status*, the focus of this factor is the worker's managerial skill and not the worker's performance of particular jobs. Accordingly, the Department declines to make the changes requested by WFCA.

What is an example of how the loss and profit factor is to be applied?

The Department is finalizing the opportunity for profit or loss depending on managerial skill factor (§ 795.110(b)(1)) with the modifications discussed herein.

Landscape Worker

- A worker for a landscaping company *performs assignments only as determined by the company for its corporate clients*.
- The *worker does not independently choose assignments, solicit additional work from other clients, advertise the landscaping services, or endeavor to reduce costs*.
- The worker *regularly agrees to work additional hours in order to earn more*.

In this scenario, the worker does not exercise managerial skill that affects their profit or loss. Rather, their earnings may fluctuate based on the work available and their willingness to work more.

Because of this lack of managerial skill affecting opportunity for profit or loss, these facts indicate employee status under the opportunity for profit or loss factor.

Vs.

Worker Providing Landscaping Services

- A worker provides landscaping services directly to corporate clients.
- The worker produces their own advertising, negotiates contracts, decides which jobs to perform and when to perform them, and decides when and whether to hire helpers to assist with the work.

In this scenario, This worker exercises managerial skill that affects their opportunity for profit or loss.

Thus, these facts indicate independent contractor status under the opportunity for profit or loss factor.

Why are managerial skills the best focus when delineating profit and loss?

Because it helps to distinguish between decisions that affect a worker's earnings and the use of initiative, judgment, or business acumen that may create opportunities for profit or loss

What actions can be considered under managerial skillsets?

1. Ability to make independent business decisions.
2. Ability to hire others or purchase materials and equipment without permission from the employer.
3. Ability to make a final determination as to whether or not the first two items must be acted upon without permission from employer.
4. Ability to accept or decline jobs where the jobs have varying degrees of potential profitability.
5. Ability to determine what jobs to pursue and how much of the worker's time and resources should be devoted to the various jobs.

What actions are NOT considered under managerial skillsets?

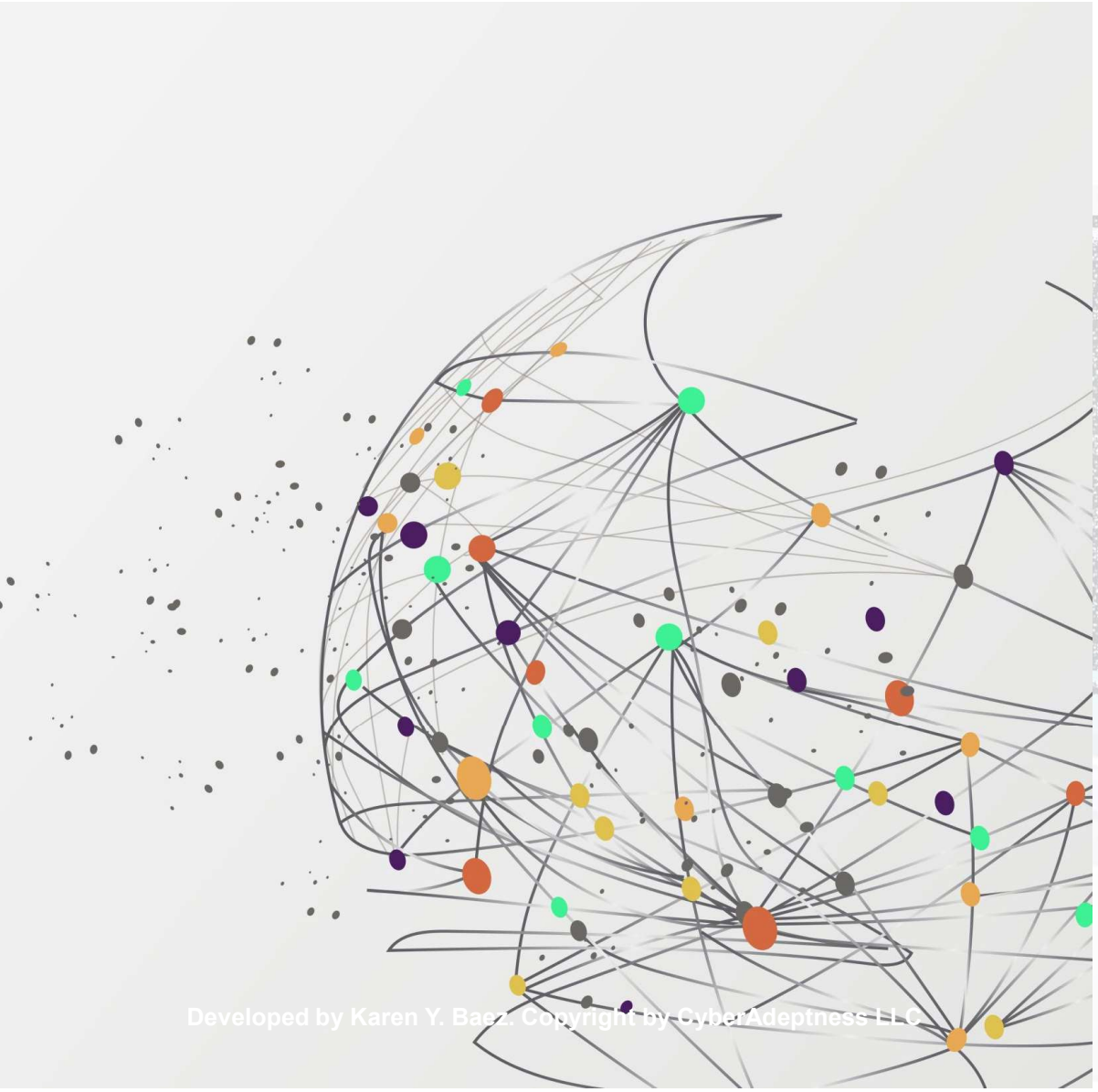
1	The amount of pay that a worker receives, such as the decision to work more hours or take more jobs when paid a fixed rate per hour or per job.
2	Implementing innovations and using entrepreneurial concepts.
3	Technical proficiency in completing each job.
3	Working more hours (when paid hourly) or working more jobs (when paid a flat fee per job) where the employer controls assignment of hours or jobs is similar to decisions that employees routinely make.

What factors do not guarantee that an individual is an Independent Contractor?

1. Soliciting Work From Multiple Clients
2. Demonstrating “no risk of loss whatsoever.”
3. Working Extra Hours or take more jobs ***when paid a fixed rate per hour or per job***

What factors do not guarantee that an individual is an Employee?

1. Not Hiring Others
2. Not Advertising



Investments by the Worker and the Potential Employer (§ 795.110(b)(2))

Overview

2/27/2024

What is considered as part of the investment factor?

This factors considers facts such as …

Whether the investment is capital or entrepreneurial in nature.

The worker's investments relative to the employer's investments.

Day-to-day Scheduling, supervision, price-setting Input

Ability to work for others to determine degree of control exerted over a worker

What did the department propose for the investment factor?

The Department proposed that this factor consider ….

1 **Whether any investments by a worker are capital or entrepreneurial in nature.**

- The provision stated that *"[c]osts borne by a worker to perform their job,"* such as *"tools and equipment to perform specific jobs and the worker's labor,"* "are not evidence of capital or entrepreneurial investment and indicate employee status."
- The provision further stated that *investments that are capital or entrepreneurial in nature* and thus indicative of independent contractor status *are those that "generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach."*

2 **The worker's investments should be considered on a relative basis with the employer's investments in its overall business.**

- The provision further said that *"[t]he worker's investments need not be equal to the employer's investments, but the worker's investments should support an independent business or serve a business-like function for this factor to indicate independent contractor status."* ***[(268) See generally 87 FR 62275 (proposed § 795.110(b)(2))]***
- The Department explained *that its proposal to treat investments as its own separate factor in the economic reality analysis* is consistent with its approach prior to the 2021 IC Rule and with the approach of most courts.
- The Department further explained that considering investments as part of the opportunity for profit or loss factor, as the 2021 IC Rule did, is flawed because, among other reasons, it "may incorrectly tilt the analysis in favor of independent contractor outcomes" and "have the effect in some cases of preventing investment from affecting the analysis."

Why is the department focused on when it comes to the investment factor?

1. On the nature and reason for the worker's investment.
2. Why the worker's investment must be capital in nature for it to indicate independent contractor status.

Consistent with that focus, the Department further explained (with a discussion of supporting case law) that "the use of a personal vehicle that the worker already owns to perform work—or that the worker leases as required by the employer to perform work—is generally not an investment that is capital or entrepreneurial in nature."
[(269) See generally id. at 62240–41]

Finally, the Department explained that its proposal to evaluate the worker's investment in relation to the employer's investment in its business *"is not only consistent with the totality-of-the-circumstances analysis that is at the heart of the economic reality test, but it would also provide factfinders with an additional tool to differentiate between a worker's economic dependence and independence based on the particular facts of the case."*

What commenters expressed support for treating investments as a separate factor?

"[c]onsistent with the Department's guidance from its earliest applications of the economic reality test until the 2021 Rule, the proposed rule considers investments by the worker and the employer as a factor distinct from opportunity for profit or loss."

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"[agreed that] treating investments as a separate factor is "consistent with the case law."

State AGs

LA Fed & Teamsters Locals

"stated that the 2021 IC Rule had "improperly combine[d]" the investments factor with the opportunity for profit or loss factor and that the NPRM's treatment of the investments factor as a separate factor "more faithfully adheres to the long history of jurisprudence defining how to determine the economic reality."

"[expressed] support [for] the proposal to treat worker investment as a standalone factor in the economic reality analysis rather than as part of [the] opportunity for profit or loss analysis."

gale

https://galehealthcaresolutions.com/

Others, including NELP, Real Women in Trucking, IBT, and AFL–CIO, expressed similar support.

What commenters expressed support for treating investments as a separate factor? [Cont.]

"[appreciated the clarification that the NPRM's investments factor would provide, stating that] "[a] true independent contractor should make significant capital or entrepreneurial investments in their business, especially relative to the entity that hired them."

Leadership Conference

"[agreed that the investments of] "a true independent contractor . . . must be capital or entrepreneurial, as opposed to tools that a worker is required by a business to have in order to perform a job."

UMBC The Shriver Center

https://shrivercenter.umbc.edu/

Others, including Farmworker Justice, Real Women in Trucking, and LIUNA, commented similarly. See also NELP, Winebrake & Santillo, LLC, Gale Healthcare Solutions.

"[described as crucial the NPRM's clarification] "that 'the use of a personal vehicle that the worker already owns to perform work—or that the worker leases as required by the employer to perform work—is generally not an investment that is capital or entrepreneurial in nature.' "

ROC UNITED RESTAURANT OPPORTUNITIES CENTERS UNITED

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"strongly encourage[d] [the Department] to include in the Final Rule its observation" regarding a worker's use of a personal vehicle."

AFL-CIO AMERICA'S UNIONS

https://aflcio.org/

"[agreed that the NPRM's approach to a worker's use of a personal vehicle was right and added that evaluating the worker's investment relative to the employer's] "is critical because even when employers push the cost of tools and supplies onto the workers doing the work at the core of the employer's business, the employers often have even larger investments."

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What changes or clarifications did commenters requested?

Some commenters that generally supported the Department's six-factor analysis requested changes to or clarifications of the investments factor. *In particular, a number of commenters addressed costs and expenses that employers require workers to bear or that they otherwise impose on workers and argued that such costs and expenses are not of a capital or entrepreneurial nature indicating independent contractor status.*

"[asserted that when a nursing agency shifts fees for malpractice insurance onto workers, those fees are not an investment by the workers.] Intelycare added: "We urge the Department to close such loopholes and instruct that companies cannot shift or attempt to disguise their own investments in an effort to avoid employee classification."

IntelyCare

https://www.intelycare.com/

"[requested that the Department] "clarify that when a company shifts its 'investment' cost or a typical cost of doing business to workers (e.g., . . . purchasing group malpractice insurance and deducting the cost from workers' pay), this transferred cost does not constitute worker investment."

gale

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"[requested that the Department make] "clear in its final rule that any investments that an employer requires fall into th[e] category of nonprobative investments, and provide additional guidance to ensure that employers cannot find additional ways to manipulate these factors."

What changes or clarifications did commenters requested?

"[similarly requested that the Department] "clarify that investments made by a worker that reflect a contractual demand by the hiring entity, rather than an independent business investment decision or meaningful negotiation between business parties, should not weigh towards independent contractor status." NELP added: "Without this clarification, hiring entities may misclassify workers as independent contractors and require or pressure them, as a condition of receiving work, to make expenditures that appear large in comparison to an undercapitalized hiring entity—such as a fly-by-night subcontractor or labor broker—to avoid accountability."

NELP NATIONAL EMPLOYMENT LAW PROJECT

https://www.nelp.org/

- Having considered these comments, *the Department agrees that costs unilaterally imposed by an employer on a worker are not capital or entrepreneurial in nature.*
- *Where the worker has no meaningful say either in the fact that the cost will be imposed or the amount,* the cost cannot be an investment indicating that the worker is in business for themself.

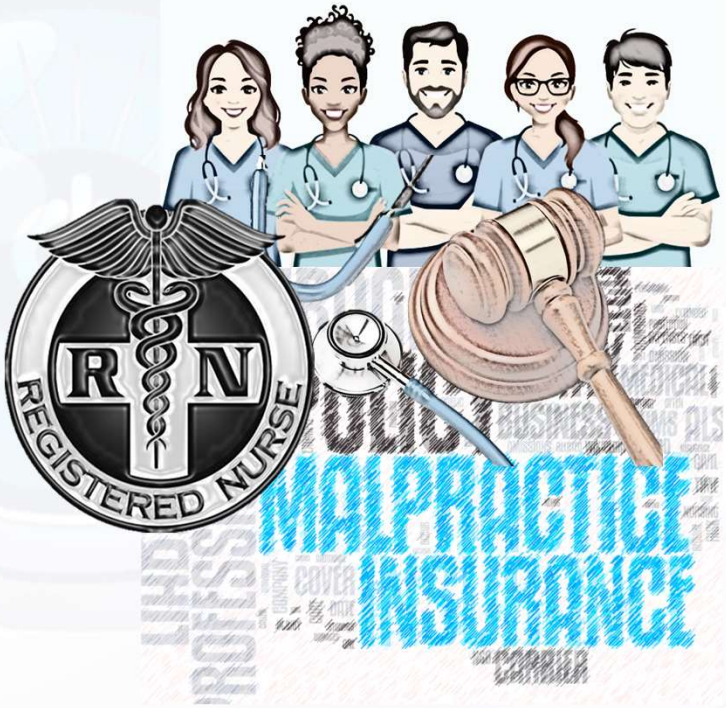
"[NELP additionally commented that] "[c]larifying the relationship between [the investments and opportunity for profit or loss] factors will help identify situations (like the personal vehicle example . . .) where a corporation may be transferring the cost of doing business to its workers, who are required to make expenditures that are not independent decisions impacting their businesses' profits or losses."

The Department believes that its discussion in this paragraph and the following paragraph, as well as its discussion below regarding the investments factor as it relates to the opportunity for profit or loss factor, provide additional clarity.

What example demonstrates how the investment factor shall be applied?

Example: Malpractice insurance for nurses

- *If such insurance is required by law or regulation and a nursing staffing agency purchases and maintains the insurance for the nurses and passes that cost on* to, or imposes a charge for insurance on, the nurses, that cost does not indicate independent contractor status.
- But, *if insurance is required by law or regulation, and the nurse can choose among policies based on their prices and coverages and does independently procure a policy*, then the cost of the insurance could be capital or entrepreneurial in nature and indicative of independent contractor status.



For these reasons, the Department is modifying the relevant sentence from the regulatory text regarding the investments factor to add the following text*: "and costs that the potential employer imposes unilaterally on the worker."*

What is the department's stance on truck ownership vs. leasing?

https://www.realwomenintrucking.org/

""stated that truck drivers who wholly own or independently finance a truck are true owner-operators because "[t]his type of investment gives [them] the ability to keep their truck if they decide to stop working for any particular company, and accordingly some measure of economic independence."

The commenter further stated that, in contrast, "employer-sponsored leases for work equipment, including for trucks, are not investments of the kind that weigh in favor of independent contractor classification."

- The Department generally agrees with this distinction, *although it is hesitant to state that the existence of an employer sponsored lease can never indicate independent contractor status.*
- Consistent with the discussion of malpractice insurance in the previous paragraph …
  - *a) if a driver is not required to lease a truck from the employer,*
  - *b) is able to consider independent financing options,*
  - *c) is able to meaningfully negotiate the terms of the lease with the employer,*
  - *d) is not required by the employer to work for it for a minimum period of time nor prohibited by it from using the leased truck to work for others, and then decides to lease from the employer,*

  the cost of the truck leased from the employer could be capital or entrepreneurial in nature, especially if the lease could ultimately result in the driver's wholly owning the truck. [1]

1. *[(272) On the other hand, where a driver has "the means to engage in the freight-hauling business only because [the employer] advanced a truck, equipment, and many other resources up front on [the employer's] own credit" and is charged for those costs, the investment factor indicates employee status. Brant v. Schneider Nat'l, 43 F.4th 656, 671 (7th Cir. 2022)]*

Are worker tools capital or entrepreneurial investments?

Regarding the proposed regulatory text's statement that *the costs to workers of tools to perform specific jobs are not capital or entrepreneurial investment*.

LiUNA! Feel the Power

"suggested the following addition: "The mere utility of a worker's tools to perform similar work for other employers does not render the worker's purchase of those tools an entrepreneurial investment, especially where the pertinent employer invests far more in facilitating or purchasing the employees' work." In support, LIUNA stated that "[t]he weight of authority . . . overwhelmingly suggests that the potential utility of a workers' tools for other projects does not render those workers[] independent contractors."

https://www.liuna.org/

- This statement, however, overlooks that the economic realities analysis considers the totality of the circumstances. A worker's use of tools alone does not determine whether the worker is an employee or independent contractor.
- Moreover, the Department believes that a worker's purchase of tools and equipment for use performing multiple jobs for multiple employers can be a capital or entrepreneurial investment.
- The regulatory text already explains that *the nature of such purchases of tools and equipment needs to be determined and that such costs to a worker and the worker's other investments should be considered on a relative basis with the employer's investments in its overall business.*
- Accordingly, *the Department declines LIUNA's suggestion.*

"stated that the NPRM "correctly focuses on whether investments are capital or entrepreneurial in nature" but expressed concerns that the "Department's decision to separate the 'investment' prong from the 'opportunities for profit and loss' prong . . . goes too far, and detracts from . . . needed clarity." According to NELA, "[a]n expenditure is only an 'investment' when it may impact profit and loss," and "[i]f an employee has spent money for work but has no opportunity for profit and loss as a result, then the conclusion should be that they are not 'investing' in anything." NELA requested that the NPRM "be edited to clarify that 'investment' inherently implies the possibility of profit and is only 'capital or entrepreneurial in nature' . . . when it has a nexus with profit and loss."

https://www.nela.org/

- The Department agrees that *whether the worker's expenditures may result in profits or losses to the worker is highly relevant to whether those expenditures are capital or entrepreneurial in nature*.
- However, because, as explained further below, *the investment factor is not synonymous with the opportunity for profit or loss factor and because adding a "nexus with profit or loss" requirement is not supported by the weight of the case law that has historically viewed the two factors as analytically distinct under the economic reality test*, the Department declines to promulgate an absolute requirement that expenditures have "a nexus with profit and loss" to be capital or entrepreneurial in nature.
- Moreover, such a requirement could be viewed as similar to the 2021 IC Rule's approach of combining the consideration of investments with opportunity for profit or loss—an approach that the Department is rejecting as discussed below. For all the reasons stated herein, the Department is restoring investments as its own separate factor.
- Although some overlaps between factors are understandable, *tying investments to profits and losses in the absolute manner suggested by NELA would be contrary to the Department's goal of rectifying the 2021 IC Rule's treatment of investments as part of the opportunity for profit or loss factor.*

What is the department's stance on the relative investment analysis?

"stated that the NPRM was "correct to incorporate a relative investment analysis" in this factor, but that "the Department should explain that the relative-investment analysis is qualitative, not quantitative, to better align this prong with the overarching dependence/independence inquiry." According to NELA, "[a] qualitative review of relative investments helps determine whether the investment is entrepreneurial in nature," but "[a]n analysis that instead focuses on a quantitative comparison of investments is rarely conclusive, because not all industries are equally capitalintensive." NELA added that "the threshold question of which expenditures are entrepreneurial 'investments' versus 'tools' makes quantitative comparison confusing and inconclusive."

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- The Department agrees that *whether the worker's expenditures may result in profits or losses to the worker is highly relevant to whether those expenditures are capital or entrepreneurial in nature*.
- However, because, as explained further below, *the investment factor is not synonymous with the opportunity for profit or loss factor and because adding a "nexus with profit or loss" requirement is not supported by the weight of the case law that has historically viewed the two factors as analytically distinct under the economic reality test*, the Department declines to promulgate an absolute requirement that expenditures have "a nexus with profit and loss" to be capital or entrepreneurial in nature.
- Moreover, such a requirement could be viewed as similar to the 2021 IC Rule's approach of combining the consideration of investments with opportunity for profit or loss—an approach that the Department is rejecting as discussed below. For all the reasons stated herein, the Department is restoring investments as its own separate factor.
- Although some overlaps between factors are understandable, *tying investments to profits and losses in the absolute manner suggested by NELA would be contrary to the Department's goal of rectifying the 2021 IC Rule's treatment of investments as part of the opportunity for profit or loss factor.*
- The Department should "clarify[] that the comparison of investments must be qualitative."

- Having considered these comments, the Department agrees that focusing the comparison of the worker's and the employer's investments on their qualitative natures is helpful.

"[As NELA points out, different industries may be more or less "capital-intensive." Thus, focusing only on the quantitative measures (e.g., dollar values or size) of the investments may not achieve the full probative value of comparing the investments."

National Employment Lawyers Association

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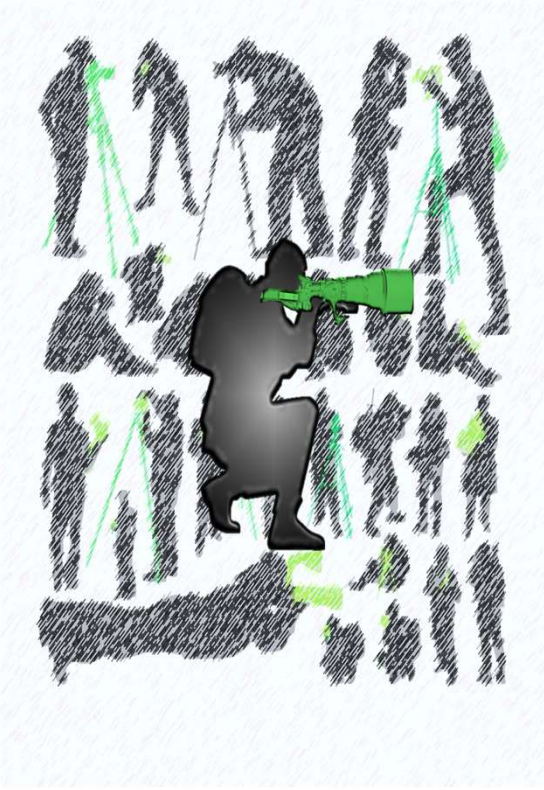
"While a single tractor trailer is a relatively small investment compared to the fleets of trucks owned by some firms, when wholly owned or independently financed, it is sufficient to support a personal trucking business, and thereby meets the standard discussed in the Proposed Rule.'"

- On the other hand, comparing the investments in a qualitative manner (i.e., the types of investments) is a better indicator of whether the worker is economically dependent on the employer for work or is in business for themself.
- That is because regardless of the amount or size of their investments, if the worker is making similar types of investments as the employer or investments of the type that allow the worker to operate independently in the worker's industry or field, then that fact suggests that the worker is in business for themself.
- The comment from Real Women in Trucking captures this point well.
- Although the driver who wholly owns or is independently financing a single truck is making a quantitatively smaller investment (in dollars and size) than the employer that has a fleet of trucks, the driver is making a similar type of investment as the employer and a sufficient investment so that the driver can operate independently in that industry—suggesting independent contractor status.

Can a photographer be deemed an Independent Contractor?



An individual photographer who has cameras and related equipment, has software to edit photos, and works out of their home.

Although the individual may not have the extent of equipment, software with every capability, or a leased office space like a larger firm, the type of investments that the individual has made are sufficient in this case for the individual to operate independently in the photography field—suggesting independent contractor status.

- Accordingly, the Department is revising the last sentence of the proposed regulatory text for the investments factor to be two sentences and to read: *"The worker's investments need not be equal to the potential employer's investments and should not be compared only in terms of the dollar values of investments or the sizes of the worker and the potential employer.*
- Instead, the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if on a smaller scale) to suggest that the worker is operating independently, which would indicate independent contractor status."

Can this factor be misinterpreted and used by an employer to engage in further tactics to exclude their workers from FLSA's protections?

IBT commented that, "[a]s it is currently written, this proposed factor could be misinterpreted as it unintentionally excludes from consideration, many of the conditions workers who work for platform-based companies are subject to." IBT added: "By overemphasizing workers' ability to increase earnings through minimal investment or personal initiative, the proposed rule risks inviting employers to engage in further tactics to exclude more of their workers from the FLSA's protections."

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The Department *disagrees with this characterization*, especially considering the modifications that it has made to the investments factor.

For all of the reasons explained herein, *the Department believes that it has struck the right balance by focusing on the nature of the worker's investment (it should be capital or entrepreneurial to indicate independent contractor status) and by qualitatively comparing the worker's investments to the employer's investments to determine if the worker is making similar types of investments as the employer to suggest that the worker is in business for themself.*

What metric process should the investment factor analysis use?

QUALITATIVE ANALYSIS.

This analysis trigger an evaluation of non-financial factors that may impact the organizations investments performance. It analyzes a company's value or prospects based on non-quantifiable information, such as management expertise, industry cycles, strength of research and development, and labor relations.

In this case, it would be an overarching examination of the main six factors proposed under this rule.

Added for further clarification by author.

What did commentors who opposed or disagree with the investment factor stated?

Numerous commenters opposed, disagreed with, and/or requested changes to or clarifications of the proposed investments factor. Several commenters opposed the NPRM's proposed treatment of investments as its own separate factor. Other commenters, such as ABC, North American Meat Institute, and the U.S. Chamber, also disagreed with the NPRM's treatment of investments as its own separate factor.

"investments are so interrelated with profits and losses that analyzing them separately is duplicative and unnecessary," and that the 2021 IC Rule, "following Second Circuit precedent," "brings clarity and helps reduce overlap to this analysis."

NRF & NCCR

N/MA

"[i]nvestment by a worker in their own business creates an expense, which by definition creates an equation whether the worker may experience loss or profit depending on the worker's net profits."

CWI

See also Coalition of Business Stakeholders.

"because the investment factor is already sufficiently addressed in the opportunity-for-profit-or-loss factor, there is no need for it to be addressed again as a standalone factor." CWI disagreed with the Department's characterization of the 2021 IC Rule on this point, stating that the 2021 IC Rule "provides that both initiative and investment must be considered, though both are not required" and thus "provides that the satisfaction of either is a necessary condition for the opportunity-for-profit-or-loss factor, but not that either is per se sufficient" (emphases added).

"[stated that the NPRM] "introduces redundancy and double-counting by assessing a worker's 'investment' in the business as a 'standalone factor.' " The commenter further stated that although the Supreme Court in Silk articulated investment as a separate factor than opportunity for profit or loss, the Court "analyzed them together," which the commenter asserted that the Department "fail[ed] to address.'

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What is the Departments final stance after reviewing the comments?

Almost all of the federal courts of appeals consider investments as a separate factor.

The Department's approach is consistent with the overwhelming majority of federal appellate case law and the Department's practice prior to the 2021 IC Rule. ***Almost all of the federal courts of appeals consider investments as a separate factor. [(274) See, e.g., DialAmerica, 757 F.2d at 1382; McFeeley, 825 F.3d at 241; Hobbs, 946 F.3d at 829; Off Duty Police, 915 F.3d at 1055; Brant, 43 F.4th at 665; Alpha & Omega, 39 F.4th at 1082; Driscoll, 603 F.2d at 754; Paragon, 884 F.3d at 1235; Scantland, 721 F.3d at 1311.]***

The Department consistently identified investments as a separate factor in the analysis prior to the 2021 IC Rule

(275) See, e.g., WHD Op. Ltr. (Aug. 13, 1954); WHD Op. Ltr. FLSA–795 (Sept. 30, 1964); WHD Op. Ltr. (Oct. 12, 1965); WHD Op. Ltr. (Sept. 12, 1969); WHD Op. Ltr. WH–476, 1978 WL 51437, at *1 (Oct. 19, 1978); WHD Op. Ltr., 1986 WL 1171083, at *1 (Jan. 14, 1986); WHD Op. Ltr., 1986 WL 740454, at *1 (June 23, 1986); WHD Op. Ltr., 1995 WL 1032469, at *1 (Mar. 2, 1995); WHD Op. Ltr., 1995 WL 1032489, at *1 (June 5, 1995); WHD Op. Ltr., 1999 WL 1788137, at *1 (July 12, 1999); WHD Op. Ltr., 2000 WL 34444352, at *1 (July 5, 2000); WHD Op. Ltr., 2000 WL 34444342, at *3 (Dec. 7, 2000); WHD Op. Ltr., 2002 WL 32406602, at *2 (Sept. 5, 2002); WHD Fact Sheet #13, "Employment Relationship Under the Fair Labor Standards Act (FLSA)" (July 2008); AI 2015–1,available at 2015 WL 4449086 (withdrawn June 7, 2017).]

- The Department *understands that the Second and D.C. Circuits consider investments and opportunity for profit or loss as one factor.* ***[(276) See, e.g., Franze, 826 F. App'x at 76; Superior Care, 840 F.2d at 1058–59; Morrison, 253 F.3d at 11 (citing Superior Care, 840 F.2d at 1058–59). 277 825 F.3d at 243]***
- However, treating investments as a separate factor is consistent with the approach taken by most federal appellate courts, the Department's intent for this final rule to be as grounded as possible in the case law, and the Department's prior guidance. And as explained below, treating investments as a separate factor rather than including it in the opportunity for profit or loss factor as the 2021 IC Rule ensures that investments are considered in each case and may result in a fuller consideration of relevant facts.

How does the 4th Circuit Court rulings impact the investment factor?

The Department recognizes that the consideration of investments may be related to the consideration of the opportunity for profit or loss. As explained on previous slides in response to a comment from NELA, *whether the worker's expenditures may result in profits or losses to the worker is highly relevant to whether those expenditures are capital or entrepreneurial in nature*.

" [cited the Fourth Circuit's decision in McFeeley to support its argument that] "[i]nvesting in one's business necessarily entails creating an opportunity for profit or risking a loss on that investment."

U.S. Chamber of Commerce

https://www.uschamber.com/

- *In McFeeley, the court noted that the two factors "relate logically to one other"* [(277) See 825 F.3d at 243] *but nonetheless articulated them* separately *[(278)Id. at 241]* and ultimately made determinations on each factor as it related to the workers' status as employees or independent contractors. [1]
- And even assuming that the Supreme Court in Silk "analyzed them together" as FSI argued, *the Court did articulate the two factors separately*. [2]

1. (279) Id. at 243 ("These two factors thus fail to tip the scales in favor of classifying the dancers as independent contractors.")
2. *(280)331 U.S. at 716. Whether the Court in Silk actually analyzed the two factors together is questionable, particularly with respect to the "driver-owners." The Court concluded that "[i]t is the total situation, including the risk undertaken [a reference to the facts that they "own their own trucks" and "hire their own helpers"], the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors." Id. at 718.*

How has the 5th Circuit Court handled the Investment Factor?

- Moreover, *as decisions from the Fifth Circuit and other Circuits demonstrate, investments may be relevant to whether the worker is economically dependent on the employer separate and apart from the worker's opportunity for profit or loss.*
- For example, the Fifth Circuit found in Parrish that *the investment factor favored employee status (although it merited "little weight" in that case given the nature of the work) and that the opportunity for profit or loss factor favored independent contractor status*. [1]
- In Cromwell, the Fifth Circuit conversely found that the investment factor indicated independent contractor status because the workers "invested a relatively substantial amount in their trucks, equipment, and tools" but that their opportunity for profit or loss was "severely limit[ed]."[2]
- The Fifth Circuit has focused on whether the worker has any *"risk capital"* in the work and has found this factor to indicate employee status when all or an overwhelming majority of the risk capital is provided by the employer.[3]

1. *(281) 917 F.3d at 382–85*
2. *(282) Cromwell v. Driftwood Elec. Contractors, Inc., 348 F. App'x 57, 60–61 (5th Cir. 2009)*
3. *(291) See Mr. W Fireworks, 814 F.2d at 1052; Pilgrim Equip., 527 F.2d at 1314*

How has the 11th Circuit Court handled the Investment Factor?

- In Nieman, the Eleventh *Circuit found that the investment factor weighed in favor of independent contractor status while the opportunity for profit or loss factor did "not weigh in favor of either" independent contractor or employee status.**[(283) 775 F. App'x at 624–25.]***
- And in Scantland, the Eleventh Circuit *found that the opportunity for profit or loss factor "point[ed] strongly toward employee status"* although the investment factor weighed slightly in favor of independent contractor status. ***[(284) F.3d at 1316–18]***

- *The 2021 IC Rule's treatment of investments as part of its opportunity for profit or loss factor* further reinforces the Department's decision to *treat investments as a separate factor.*
- *The 2021 IC Rule stated that its opportunity for profit or loss factor indicates independent contractor status if the worker exercises initiative or if the worker manages their investment in the business*. [1]

1. (285) 86 FR 1247 ("This factor weighs towards the individual being an independent contractor to the extent the individual has an opportunity to earn profits or incur losses based on his or her exercise of initiative (such as managerial skill or business acumen or judgment) or management of his or her investment in or capital expenditure on, for example, helpers or equipment or material to further his or her work.")

How did the 2021 IC rule impact the investment factor?

- In sum, nothing in this final rule forecloses consideration, in an appropriate case, of investments as they relate to the worker's opportunity for profit or loss.
- *However*, for all of the reasons set forth on the right and consistent with this final rule's totality-of-the-circumstances approach, *treating investments as a separate factor in the analysis ensures that investments are accorded, at least at the outset of the analysis, the same considerations as the other factors and that the probative value of the investments toward the worker's dependence or independence will affect the ultimate outcome of the analysis.*

- Although "the effects of the [worker's] exercise of initiative and management of investment are both considered" under its opportunity for profit or loss factor, *the 2021 IC Rule clearly stated that a worker "does not need to have an opportunity for profit or loss based on both for this factor to weigh towards the individual being an independent contractor."*
- Thus, contrary to, for example, the argument of CWI that there would be a "balancing test," *the 2021 IC Rule provided that, if either initiative or investment suggested independent contractor status, the other could not change that outcome even if it suggested employee status.*
- *The 2021 IC Rule's approach to investments was accordingly flawed because* it, in some cases, *eliminated the role of investments in helping to determine a worker's status, particularly when the investments or the lack thereof indicated that the worker was an employee.*

Is the worker's investment capital or entrepreneurial a probative factor?

A few commenters objected to the proposed regulatory text's statement that the investments factor "considers whether any investments by a worker are capital or entrepreneurial in nature." *[87 FR 62275 (proposed § 795.110(b)(2))]*

"[n]othing in Silk or Rutherford construed the factor so narrowly," and that "limiting investments to those that are 'capital or entrepreneurial' would disproportionately impact underserved communities" because "the standard imposes significant barriers for individuals without the financial resources needed for capital and entrepreneurial investments—i.e., it penalizes, and removes freedom in choosing work arrangements, from those without pre-existing financial resources."

CWI

https://flex.com/

"tools need not be 'capital or entrepreneurial in nature' to have the effect of helping the worker achieve economic independence."

- Having considered these comments, the Department adopts the proposal that whether the worker's investments are capital or entrepreneurial in nature is probative of whether they indicate employee or independent contractor status.
- Considering the worker's investment in this manner is consistent with the overall inquiry of determining whether the worker is economically dependent on the employer for work or is in business for themself because a capital or entrepreneurial investment indicates that the worker is operating as an independent business.
- More specifically, capital or entrepreneurial investments tend to help a worker work for multiple companies—a characteristic of an independent business.
- Accordingly, the examples in the regulatory text ("increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach") generally involve efforts to work independently for multiple companies.
- Focusing on whether the worker's investments are capital or entrepreneurial in nature does not construe the factor "narrowly," as CWI asserted.

Is there a minimum-dollar threshold or other requirement?

- As explained below in response to specific comments asserting that this factor is limiting, *there are no minimum-dollar thresholds or other requirements for investments to be capital or entrepreneurial* ***and thus indicate independent contractor status.*** Instead, focusing on the nature of the worker's investments ties this factor to the worker's economic dependence or independence.
- Many federal appellate court decisions have emphasized how the worker's investment must be capital in nature for it to indicate independent contractor status. For example, the *Seventh Circuit determined in Lauritzen that migrant farm workers were not independent contractors, but employees, due in part to the lack of capital investments made by the workers.* ***[(288) See 835 F.2d at 1537]***
- The court explained that investments that establish a worker's status as an independent contractor should be *"risk capital [or] capital investments, and not negligible items or labor itself. . . .* The workers here are responsible only for providing their own gloves [which] do not constitute a capital investment.

How has the 10th and 6th Circuit Court handled the Investment Factor?

- In Paragon, the Tenth Circuit explained that *"the relevant 'investment'* is '*the amount of large capital expenditures, such as risk capital and capital investments, not negligible items, or labor itself.' "*
- The Sixth Circuit has described this factor as the *"capital investment factor."* ***[(292) See Off Duty Police, 915 F.3d at 1056 (quoting Donovan v. Brandel, 736 F.2d 1114, 1118–19 (6th Cir. 1984))]***
- Moreover, CWI's efforts to use Silk and Rutherford to undercut the Department's approach are unpersuasive. In Silk, the unloaders *"provided only picks and shovels,"* and there was nothing to suggest that their *"simple tools" were capital or entrepreneurial in nature.* ***[(293) 331 U.S. at 717–18]***
- On the other hand, the *"driver-owners"* at issue in Silk *"own[ed] their own trucks"* and *"hire[d] their own helpers,"* and at least some worked *"for any customer."* ***[(294) Id. at 719]***
- The circumstances of the driver-owners, and particularly *the indication that their owned trucks and hired helpers allowed them to manage their businesses, operate independently, and work for multiple customers, suggest that their investments were capital or entrepreneurial in nature.*
- And Rutherford is not instructive because *the workers merely owned some tools specific to their boning work*—nothing that suggested any type of investment to the Court indicating that they were independent contractors. ***[(295) 331 U.S. at 725]***
- Focusing on whether the worker's investments are capital or entrepreneurial nature is thus consistent with Silk and Rutherford and is not a narrowing of those decisions.

Are worker's effort to obtain specialized education and training considered capital?

https://www.appraisalinstitute.org/

"asked whether "an appraiser seeking out specialized education, training, and certification" is making a capital or entrepreneurial investment "even when those trainings or certifications are industry requirements for certain categories of work."

Appraisal Institute

Specialized Training

As a general matter and as opposed to costs that a potential employer unilaterally imposes on a worker*, a worker's efforts to obtain specialized education, training, and certification that are required by an industry can be capital or entrepreneurial in nature … (for example and as explained in the regulatory text) …*

ONLY IF they increase the worker's ability to do different types of or more work or extend market reach.

What commenters said about capital investment?

"Dreamers certainly have skills and initiative, but not the resources to make the level of capital investment that the DOL seems to be proposing."

THEDREAM.US

https://www.thedream.us/

https://clda.org/

CLDA Customized Logistics and Delivery Association

"[Asserted that the] "rule commentary also states the investment must be large, must be a capital expenditure, and must be entrepreneurial in nature." It added: "This ignores the practical realities of starting a business. Few entrepreneurs can start a business with multi-million dollar investments in equipment, technology, and real estate."

DSA DIRECT SELLING ASSOCIATION

https://www.dsa.org/

"[similarly commented that] focusing on whether the investment is capital or entrepreneurial in nature "would disproportionately impact underserved communities that direct selling serves such as Hispanics." Stating that "practically any individual can start [a direct selling business] for an average of $82.50," it added that the Department proposed "a rule that would penalize this low-cost business by requiring a large investment to point towards being an independent contractor."

- Although the NPRM cited cases discussing "large" expenditures, [1] the NPRM focused on the nature of the investments, did not propose any minimum-dollar threshold, and absolutely did not suggest that "multi-million-dollar" or even "large" investments are required for this factor to indicate independent contractor status.
- As explained above, focusing on the nature of the investments and whether they are capital or entrepreneurial in nature is most probative of whether the worker is economically dependent on the employer for work or in business for themself.
- Consistent with that focus, there is no minimum-dollar threshold or requirement that the investment be "large" or of a certain level for a worker's investment to be capital or entrepreneurial in nature.

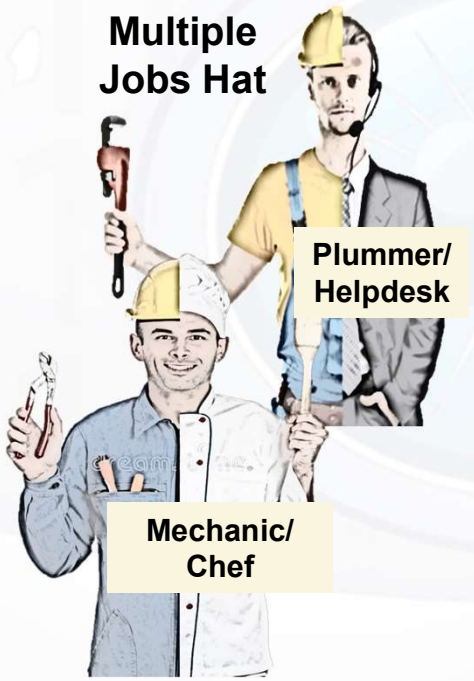
1. (296) 87 FR at 62241 (citing Paragon, 884 F.3d at 1236 (quoting Snell, 875 F.2d at 810); Lauritzen, 835 F.2d at 1537)

When will a worker's investment be deemed capital or entrepreneurial?

" [the examples of capital or entrepreneurial investments in the proposed regulatory text] "unnecessarily limit the personal investments that should be considered in the analysis and seem to suggest that independent contractors can only be those individuals who want to expand their business, increase their workload, or extend the business' market reach."

MEP National Network™

https://mepnnams.com/



- *These examples, however, are preceded in the regulatory text by the words "such as" and are plainly a non-exhaustive set of examples—none of which have to be satisfied.**[(297) Id. at 62275 (proposed § 795.110(b)(2))]***
- A worker's investments are most likely to be capital or entrepreneurial in nature *if they create or further the worker's ability to work for multiple employers* (as these examples suggest), but the examples are not limiting as MEP asserted.
- Likewise, in response to comments discussed below about particular types of *investments, such as computers, phones, and specialized software,* the Department *is not suggesting that certain types of investments are always or can never be capital or entrepreneurial. Instead, the focus should be on the nature of the investment in the circumstances.*

What type of concerns commenters had?

Numerous commenters raised concerns with the statement in the proposed regulatory text that: *"Costs borne by a worker to perform their job (e.g., tools and equipment to perform specific jobs and the workers' labor) are not evidence of capital or entrepreneurial investment and indicate employee status."*[1]

1. *[(298) Id. As explained above, the Department is modifying this provision in response to comments to add "and costs that are unilaterally imposed by the potential employer on the worker."]*

"[stated that the proposed provision] "is far too broad of a directive to be of any use in conducting an independent contractor analysis" and that it would require factfinders to "ignore any amount of investment a worker made in his or her tools and equipment, even if those tools and equipment were—as in the case of a software security auditor who provides his own specially designed laptop—highly specialized and expensive."

Coalition of Business Stakeholders

"[contrary to the proposed regulatory text,] "such investments are plainly a function of the business-like decisions that contractors must make in choosing between the projects available to them" because "[t]hey may purchase equipment that allows them to complete a particular job more quickly—and thus more profitably—or may bypass projects requiring discrete expenditures that would lower profitability."

CWI

"independent contractors in the construction industry who invest in their own tools and equipment are in fact acting as entrepreneurs, and such investment should continue to be recognized as indicative of independent contractor status."

U.S. Chamber of Commerce

https://www.uschamber.com/

" [stated … this provision "contradicts the weight of case law, which has held that a worker's investment in the equipment necessary to perform a discrete job is evidence of independent contractor status" and that "[e]ven the Fifth Circuit, which utilizes a 'relative investment' inquiry, has found this to be true"). The U.S. Chamber added that "workers can be in business for themselves without having to expend huge sums of money," and that "[a] 'knowledge-based' worker, such as an IT worker, may be able to perform independent work with only a laptop or tablet, which are seemingly ubiquitous and relatively inexpensive."

Can tools such as phones and software constitute an investment?

"asked whether "the investment in a computer, a cell phone and some specialized software constitute a meaningful enough investment to indicate independent contractor status under [the investments factor]?"

https://fightforfreelancersusa.com/

https://flex.com/

"When a worker's investment in tools and equipment allows the worker to move from client to client, the worker's investment in those tools and equipment makes the worker less economically reliant on any one client."

https://wfca.org/

agreed with evaluating the worker's "capital expenditures," it expressed concern that the NPRM "eliminates one of the major capital expenses of many independent contractors—tools and equipment." WFCA identified "specialty tools" such as a "floor scrapper" and "power stretchers," and stated that '[t]hese tools and equipment are major investments and should be recognized in evaluating whether the installer is an independent contractor or an employee." WFCA suggested modifying this provision in the regulatory text so that it provides that "investment in tools and equipment to perform specific jobs (other than common household tools or equipment) are evidence of capital or entrepreneurial investment and indicate independent contractor status."

"[noting that] the Tenth Circuit reasoned that '[t]he mere fact that workers supply their own tools or equipment does not establish status as independent contractors' " (citing Paragon, 884 F.3d at 1236), commented that "not establishing status as independent contractors is vastly different from establishing status as employees," and that "[a]t most, a finding that an individual bears that costs of performing a service would be neutral."

CPIE

https://www.ooida.com/

" [expressed concern that this provision] "might be construed as saying that the purchase or financing of equipment like a truck or trailer does not weigh in favor of independent contractor status since this equipment is used to complete a job." It asked the Department to "better clarify between the 'tools and equipment' that are used by a worker to perform specific jobs and may not indicate independent contractor status with the 'capital and entrepreneurial' investments that do."

After reviewing the comments, what's the department stance?

"expressed concern that a "medium duty Class 6 box truck, which costs between $50,000—$90,000 on average . . . may not indicate independence under the Proposed Rule, because . . . a medium duty truck is arguably expedient to perform the business of home delivery transportation."

National Home Delivery Association
Advancing Delivery & Set-Up of Bulky Goods

Home | NHDA (nationalhomedeliveryassociation.com)

- Having considered these comments, the Department continues to believe that it is helpful to provide guidance regarding workers who provide tools and equipment to perform a specific job, but acknowledges that the "to perform their job" language in the proposed regulatory text can be made more precise.
- Applying the general principle from the regulatory text that the focus should be on whether the investment is capital or entrepreneurial in nature and that capital or entrepreneurial investments tend to increase the worker's ability to do different types of or more work, reduce costs, or extend market reach, investment in tools or equipment to perform a specific job would not qualify as capital or entrepreneurial.
- As the Department explained in the NPRM, *"an investment that is expedient to perform a particular job (such as tools or equipment purchased to perform the job and that have no broader use for the worker) does not indicate independence."* ***[(299) Id. at 62241]***
- On the other hand, a worker may invest in tools and equipment for reasons beyond performing a particular job, such as to increase the worker's ability to do different types of or more work, reduce costs, or extend market reach. Such investments can be capital or entrepreneurial in nature.
- To the extent that the "to perform their job" language in the proposed regulatory text suggested otherwise, the Department is removing that language. Accordingly, the Department is further modifying the regulatory text so that this provision reads: *"Costs to a worker of tools and equipment to perform a specific job, costs of workers' labor, and costs that the potential employer imposes unilaterally on the worker, for example, are not evidence of capital or entrepreneurial investment and indicate employee status."*
- A worker may have expenses to perform a specific job and also make investments that generally support, expand, or extend the work performed which may be of a capital or entrepreneurial nature. Thus, *the existence of expenses to perform a specific job will not prevent this factor from indicating independent contractor status so long as there are also investments that are capital or entrepreneurial in nature.*

Is a personal vehicle previously owned deemed an investment?

A number of commenters expressed concerns with the statement in the NPRM's preamble that *"the use of a personal vehicle that the worker already owns to perform work—or that the worker leases as required by the employer to perform work—is generally not an investment that is capital or entrepreneurial in nature."* Several of those commenters, however, gave examples of vehicles that are plainly not the type of vehicles identified in this statement.

"most entrepreneurs start their businesses with what they already have,"* stating that *"[t]hey start with using . . . their car as their delivery vehicle."* CLDA added that *"[t]hose items may have started as personal items, but they become critical business tools and critical business investments when the entrepreneur starts using them to build a business."

CLDA Customized Logistics and Delivery Association

https://clda.org/

U.S. Chamber of Commerce

commented that the NPRM's "absolutist statement ignores the fact that contractors may utilize their personal vehicles in a way that shows entrepreneurial activity. For example, if workers forgo selling their personal vehicle and, instead, choose to use their vehicle to drive for a ridesharing platform, that is quintessentially entrepreneurial activity. The fact that they had already owned their vehicle is immaterial."

https://www.uschamber.com/

"commented that "[w]hile it is true that drivers on platforms like Uber's may be using vehicles they owned before they started driving, drivers can, and some do, choose to invest in, for example, a luxury vehicle in order to earn more by way of higher-end engagements . . . [or] a hybrid or electric vehicle specifically to increase their fuel economy."

https://www.uber.com/

Uber

MEP National Network™

https://mepnnams.com/

"[stated that] "[i]ndividuals may not make . . . investments [in things such as personal vehicles] for the purpose of performing work, but individuals can choose to monetize those investments through independent work arrangements, such as via the gig economy." It added that "[u]sing these pre-owned investments to engage in independent work should reflect economic independence, which is the ultimate inquiry in the worker classification analysis."

Is a personal vehicle previously owned deemed an investment? [Cont.]

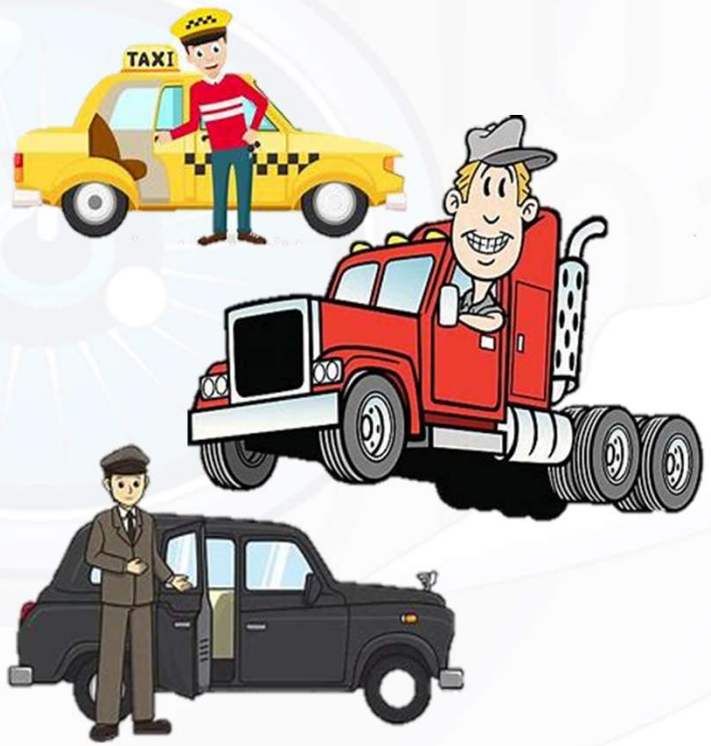
"suggested that the NPRM's "discussion of vehicle investments should be withdrawn, and that the weight that each investment is afforded should instead be evaluated under the totality of the circumstances in which each such investment occurred."

CWI

- Having considered the comments, *the Department agrees with the comments discussed above from commenters that supported the NPRM's statement regarding personal vehicles, including AFL–CIO, LA Fed & Teamsters Locals, and ROC United, and reaffirms this statement.*
- Whether a vehicle owned or leased by a worker and used to perform work is a capital or entrepreneurial investment *does depend on the totality of the circumstances.*
- In the scenario where a worker already owns a vehicle and happens to then use it to perform work, *the acquisition of that vehicle was not for a business purpose and generally cannot be a capital or entrepreneurial investment.*
- As the Eleventh Circuit explained in Scantland, the *"fact that most technicians will already own a vehicle suitable for the work"* suggests that there is *"little need for significant independent capital."* ***[(302) 781 F.2d at 1318]***

Is a personal vehicle previously owned deemed an investment? [Cont.]

- If a worker already owns a vehicle for personal use and then modifies, upgrades, or customizes the vehicle to perform work, the worker's investment in modifying, upgrading, or customizing the vehicle could be a capital or entrepreneurial investment.
- In other scenarios, whether the vehicle is a capital or entrepreneurial investment often depends on *whether the vehicle was purchased for a personal or business purpose*.
- Where any vehicle is suitable to perform the work, purchase of the vehicle is generally not a capital or entrepreneurial investment.
- When the worker owns a vehicle with certain specifications (such as a van or truck) to perform the work and the worker also uses the vehicle for personal reasons, that personal use is relevant, but the vehicle may still be a capital or entrepreneurial investment.
- For example, the *Sixth Circuit* has found that, where the workers' vehicles *"could be used for any purpose, not just on the job," they did not indicate independent contractor status*. ***[(303) Off Duty Police, 915 F.3d at 1056].***



Is a personal vehicle previously owned deemed an investment? [Cont.]

"stated that "the NPRM posits that a worker buying a car is an immaterial investment for purposes of independent contractor classification if they also use the car for personal reasons."

WPI

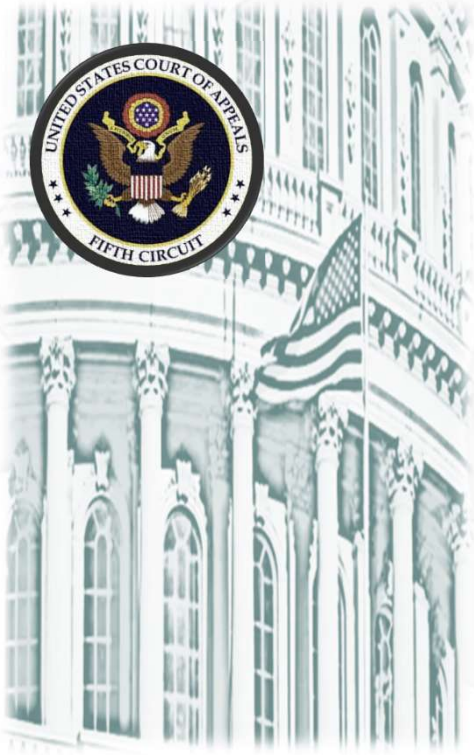
- The commenter, however, mischaracterized the NPRM's statement, which addressed a personal vehicle that the worker already owns (and thus invested in for reasons other than a business purpose) and then uses to perform work.
- In the different scenario posited by the commenter, a car purchased by a worker may be an investment of a capital or entrepreneurial nature if purchased for a business purpose even if the worker also uses the car for personal reasons.

" [similarly mischaracterized the NPRM's statement, saying that the NPRM] *"presumptively declares that a vehicle, should be considered 'generally not an investment that is capital or entrepreneurial in nature' "* (quoting the NPRM).

Coalition of Business Stakeholders

The NPRM's statement, however, addressed only a vehicle already owned by a worker that the worker then uses to perform work.

How has the 5th Circuit Court of Appeals addressed vehicles used for business?



- The Fifth Circuit has considered the purpose of the vehicle and how the worker uses it, and in Mr. W Fireworks, it noted *that most of the workers in that case purchased vehicles for personal and family reasons, not business reasons, in concluding that the investment factor indicated employee status.* [1]
- The Fifth Circuit has also noted that, *"[a]lthough the driver's investment of a vehicle is no small matter, that investment is somewhat diluted when one considers that the vehicle is also used by most drivers for personal purposes."* [2]
- In sum, focusing on the purpose of the vehicle and how it is used is consistent with the overarching inquiry of examining the economic realities of the worker's relationship with the employer.
- And the reality for a worker who already owns a vehicle for personal use and then uses it (without any modifications) to perform work is that the vehicle was not purchased for a business purpose and generally is not a capital or entrepreneurial investment.
- Even where a personal vehicle is not a capital investment indicating independent contractor status, there may be other facts relevant to the investment factor, and the worker's ultimate status will be determined by application of all of the factors, consistent with the totality-of-the-circumstances analysis.

1. (304) 814 F.2d at 1052
2. (305) Express Sixty-Minutes, 161 F.3d at 304; see also Keller, 781 F.3d at 810–11 (fact that equipment could be used "for both personal and professional tasks" weakens the indication of independent contractor status).

Why did commenters oppose the worker's investment proposal?

Finally, numerous commenters opposed the NPRM's proposal to consider the worker's investments "on a relative basis with the employer's investments in its overall business." *[87 FR 62275 (proposed § 795.110(b)(2))]* That proposed regulatory text further provided that "[t]he worker's investments need not be equal to the employer's investments, but the worker's investments should support an independent business or serve a business-like function for this factor to indicate independent contractor status."

" [expressed] "grave concerns" with comparing investments, stating that this approach "is inconsistent with law, uninformative to the economic realities test, and ultimately injects nothing but further uncertainty into the analysis." CWI added that the Supreme Court in Silk addressed only the workers' investments and not the employer's investments, and that an "employer investing in its own business provides absolutely no insight into whether the worker is economically dependent on that business." CWI further stated that "[i]t is hardly surprising that virtually all workers—employees and independent contractors alike—have fewer resources than businesses," but "[t]hat fact, however, does not influence the question of economic dependence for either group."

CWI

" requested clarification in the franchise context, noting that franchise opportunities require varying upfront investments, but "[t]his does not mean that someone who invests in a lower-cost franchise opportunity is any less an independent business person than someone with the means to invest a million dollars in a franchise."

IFA

NRF & NCCR

" requested that any consideration of relative investments "be stricken entirely," raising similar concerns to CWI. NRF & NCCR added that consideration of relative investments would create barriers to entry in businesses because workers "would effectively be excluded from contracting with any but the smallest of companies."

FINANCIAL SERVICES INSTITUTE
VOICE OF INDEPENDENT FINANCIAL SERVICES FIRMS AND INDEPENDENT FINANCIAL ADVISORS

https://financialservices.org/

"stated that the Department "offers no reasoned explanation why that relative inquiry is probative of independent contractor status, contrary to the 2021 Rule's conclusion that it measures an irrelevant comparison of respective organizational size."

Why did commenters oppose the worker's investment proposal? [Cont.]

" argued that considering relative investments is inconsistent with Silk because the Supreme Court in that case "addressed the investment of the worker as part of the economic realities test only by reference to the worker's investment." The commenter added: "A putative employer's level of investment in its own business provides no insight into whether the worker is economically dependent on that business, as the work and investment made by the worker may be in an entirely different area of services than that even performed by the putative employer."

N/MA

" [commented that the 2021 IC Rule was correct to reject a relative investments analysis.] It added: "The size of the hiring business has no relevance to whether the worker is a contractor or an employee. Consider a talented translator who translates a book, on the same terms and for the same fee, into French for a local college press and into Spanish for a major commercial publishing house. Why should she be considered more likely to be an employee when doing the Spanish work?"

THE CLUB FOR GROWTH FOUNDATION

https://clubforgrowthfoundation.org/

"similarly commented that "it doesn't make sense that an owner-operator would be an independent contractor if they are working with a three-truck carrier but then be judged differently if they go to work for a carrier with hundreds or thousands of trucks."

OOIDA

https://www.ooida.com/

The CA Chamber, CLDA, Flex, NACS, NHDA, and Scopelitis, made similar points. See also ABC; CPIE; WFCA.

What's the Departments input after reviewing the comments?

- Having considered these comments, the Department *continues to believe that comparing the worker's investments to the employer's investment is well-grounded in the case law* and the Department's prior guidance.
- The Department further believes that comparing types of investments is indicative of whether a worker is economically dependent on the employer for work or is in business for themself. Although the Supreme Court in Silk did not make such a comparison, federal courts of appeals applying the factors from Silk routinely make that comparison.
- For example, the Fifth Circuit *"consider[s] the relative investments"* and has explained that, "[i]n considering this factor, 'we compare each worker's individual investment to that of the alleged employer.' " [1]

1. **(309) Hobbs, 946 F.3d at 831–32** (quoting **Cornerstone Am., 545 F.3d at 344**). In Parrish, the Fifth Circuit compared the relative investments as part of its analysis but accorded the relative investment factor "little weight in the light of the other summary-judgment-record evidence supporting IC-status." **917 F.3d at 382–83**. This does not support the conclusion that this factor is not useful; instead, it simply reflects the Fifth Circuit's faithful application in that case of a totality-of-the-circumstances approach considering many factors, no one of which was dispositive.

What's has been the federal court of appeals take on individual investment considerations?

- The Sixth Circuit has explained that *"[t]his factor requires comparison of the worker's total investment to the 'company's total investment, including office rental space, advertising, software, phone systems, or insurance.' "* ***[(310) Off Duty Police, 915 F.3d at 1056 (quoting Keller, 781 F.3d at 810)]***
- The Fourth Circuit has similarly compared the *employers' payment of rent, bills, insurance, and advertising expenses to the workers' "limited" investment in their work.* ***[(311) McFeeley, 825 F.3d at 243]***
- In addition, the Third Circuit Court > ***[(312) Verma, 937 F.3d at 231 (summarizing how courts have viewed this factor in cases examining the employment status of exotic dancers: "all concluded that 'a dancer's investment is minor when compared to the club's investment' ") (quoting the district court's decision).]***
- The Ninth Circuit Court > ***[(313) Driscoll, 603 F.2d at 755 (strawberry growers' investment in light equipment, including hoes, shovels, and picking carts was "minimal in comparison" with employer's total investment in land and heavy machinery).***] and
- The Tenth Circuit ***> [(314) Paragon, 884 F.3d at 1236 ("To analyze this factor, we compare the investments of the worker and the alleged employer."); Flint Eng'g, 137 F.3d at 1442 ("In making a finding on this factor, it is appropriate to compare the worker's individual investment to the employer's investment in the overall operation.").]*** Circuits have compared the worker's investments to the employer's investments.

What was the department's previous guidance on the comparison of investments between parties?

"the Department's proposal to compare the worker's and the employer's relative investments "directly contradicts the Department's sub-regulatory guidance in Fact Sheet #13, which for decades has advised that 'the amount of the alleged contractor's investment in facilities and equipment' is not only relevant to a worker's status but tends to support classification as an independent contractor."

https://flex.com/

Fact Sheet #13 has been revised several times over the past years and will be revised to reflect this final rule. Regardless, there is no basis for Flex's characterization that the version of Fact Sheet #13 available at the time of the NPRM advised that this factor "tends to support classification as an independent contractor" as that language is not in the Fact Sheet.]

- The Department has previously provided guidance that the worker's investments and the employer's investments should be compared.
- In AI 2015–1, the Department explained that a worker's investment "should not be considered in isolation" because "it is the relative investments that matter." ***[(315) 2015 WL 4449086, at *8 (withdrawn June 7, 2017)]***
- AI 2015–1 further explained that, in addition to "the nature of the investment," "comparing the worker's investment to the employer's investment helps determine whether the worker is an independent business." ***[(316) Id.]***
- The Department has *also compared the worker's and the employer's relative investments in opinion letters issued by WHD*. [1]
- In sum, the relative investments approach is firmly supported by the case law and the Department's precedent.

1. (317) See **WHD Op. Ltr., 2002 WL 32406602, at *1– 2 (Sept. 5, 2002)** (workers' "hand tools, which can cost between $5,000 and $10,000," were "small in comparison to [the employer's] investment," but the "amount is none the less substantial" and "thus indicative of an independent contractor relationship"); **WHD Op. Ltr., 2000 WL 34444342, at *4 (Dec. 7, 2000)** (comparing "the relative investments" of the worker and the employer is the correct approach).

How are the commenters concerns addressed by the department?

- The Department understands the concerns raised by many commenters with merely comparing the size of and dollar expenditures by the worker to those of the employer, especially for workers who are sole proprietors.
- Accordingly, as explained above in response to comments from NELA and others that suggested that the comparison of the worker's and the employer's investments should focus on the "qualitative" nature of their respective investments, the Department is modifying the last sentence of the proposed regulatory text for the investments factor to be two sentences and to read: *"The worker's investments need not be equal to the potential employer's investments and should not be compared only in terms of the dollar values of investments or the sizes of the worker and the potential employer. Instead, the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if on a smaller scale) to suggest that the worker is operating independently, which would indicate independent contractor status."*
- This modification should address commenters' concerns that the size of and/or dollar investments of the employer will determine the outcome when comparing the investments. As explained above, *comparing the qualitative (rather than primarily the quantitative) value of the investments is a better indicator of whether the worker is economically dependent on the employer for work or is in business for themself.*
- That is because, regardless of the amount or size of their investments*, if the worker is making similar types of investments as the employer or investments of the type that allow the worker to operate independently in the worker's industry or field, then that fact suggests that the worker is in business for themself.*[1]

1. (319) Comparing the investments qualitatively also addresses the Eighth Circuit's ruling in Karlson that the district court was correct to allow evidence of the worker's and the employer's relative investments, but also correct to not allow the worker to ask the employer about the dollar amount of its investment in order to simply compare the dollar value of the employer's investment to the worker's investment. See **860 F.3d at 1096**

What example can the department use on how Qualitative Analysis is to be used?

- Applying this qualitative approach to, for example, the hypothetical truck driver described by OOIDA is instructive. The hypothetical suggests that a driver "would be an independent contractor if [the driver is] working with a three-truck carrier," but the same driver would be an employee if the driver goes *"to work for a carrier with hundreds or thousands of trucks.'*
- This hypothetical and the hypotheticals offered by Club for Growth Foundation, Flex, and other commenters overlook the totality-of-the-circumstances nature of the economic realities analysis. No one fact or factor (including comparing the worker's investments to the employer's investments) will necessarily determine a worker's status as an employee or independent contractor.
- Comparing the driver's investment qualitatively with each carrier, however, should produce the same indicator of employee or independent contractor status.
- With respect to either carrier, *the focus should be on whether the driver is making similar types of investments as the carrier (even if on a smaller scale) so that the driver (like the carrier) can operate independently in the industry.*
- As the application of a qualitative comparison to this hypothetical shows, *this focus better aligns the relative investment analysis with the ultimate inquiry of whether the worker is dependent on the employer for work or in business for themself.*

Based on the comments how will thd department address the final ?

"commented that "[n]othing in the Proposed Rule explains whether the [relative investments] analysis is focused on investments that the company made in the specific worker's business (i.e., paying for the worker's staff, rent, tools or equipment) or whether the analysis focuses on the overall investment of the company in the entirety of its separate business operations (i.e., advertisements, branding, overhead for headquarters, etc.)."

ACLI

https://www.acli.com/

"[also requested that the Department [***"clarify how the relative investments of the worker and the employer would be measured***."

"The NPRM offers no guidance on how to distinguish between those arrangements for which its proposed comparison of an individual's investment with a company's investment in its overall businesses would be relevant and those arrangements for which its proposed comparison should be disregarded.").

CPIE

CPIE and IBA suggested modifying the relative investments analysis to "measure an individual's investment in the specific items the individual requires to perform the individual's services, or compare the relative investment in those specific items by an individual and the company."

'It is unclear whether the analysis is focused on investments that the company made in the specific worker's business (i.e., purchasing tools or equipment for the individual worker) or whether the analysis focuses on the overall investment of the company in its business operations (i.e., branding, marketing campaigns, etc.)."

https://www.americansecurities.org/

The proposed and final regulatory text, however, clearly indicate that the worker's investments should be considered on a relative basis with *"the employer's investments in its overall business."* 29 CFR 795.110(b)(2).

The Department has provided additional guidance in the discussion above and by modifying the regulatory text to convey that *"the focus should be on comparing the investments qualitatively"* more than by *"comparing dollar values of investments or the sizes of the worker and the employer."* 29 CFR 795.110(b)(2).

These commenters *state that such a modification would avoid the need to address the relative size and magnitude of the worker and the employer and would be consistent with the ultimate inquiry of economic dependence.*

For all of the reasons explained above, however, the Department believes that those goals are better accomplished by focusing relative investments on a qualitative comparison.

What example can the department use on how Qualitative Analysis is to be used?

"commented that the proposed "Relative Investment factor conflicts with . . . the Ability to Profit or Loss Based On Managerial Skill factor" because the Department is "saying that a worker's effectiveness in managing their overhead and expenses to maximize profit suggests independent contractor status, but that a worker's failure to invest sizeable sums to offset the company's investment suggests employment status." It added that the opportunity for profit or loss factor "should be given greater weight than the relative investment factor so that workers who are skilled in managing their own overhead expenses are not penalized and deemed employees simply because they are better businesspeople and need to invest less and less over time as their businesses mature."

https://www.acli.com/

American Securities Association made a similar point.

- As an initial matter, the Department is not giving any factor any greater predetermined weight than any of the other factors for all of the reasons explained in this final rule. And as reiterated in this final rule, workers will not be "deemed employees" when applying the economic realities analysis based on one fact or factor because the analysis considers the totality of the circumstances.
- The Department's modifications to the investments factor, and particularly the emphasis on comparing the worker's investments and the employer's investments qualitatively more than quantitatively, should address any concern that *"a worker's failure to invest sizeable sums to offset the company's investment suggests employment status."*
- The Department is finalizing the investments factor (§ 795.110(b)(2)) with the revisions discussed herein.

When is a vehicle deemed an investment for self-employment?

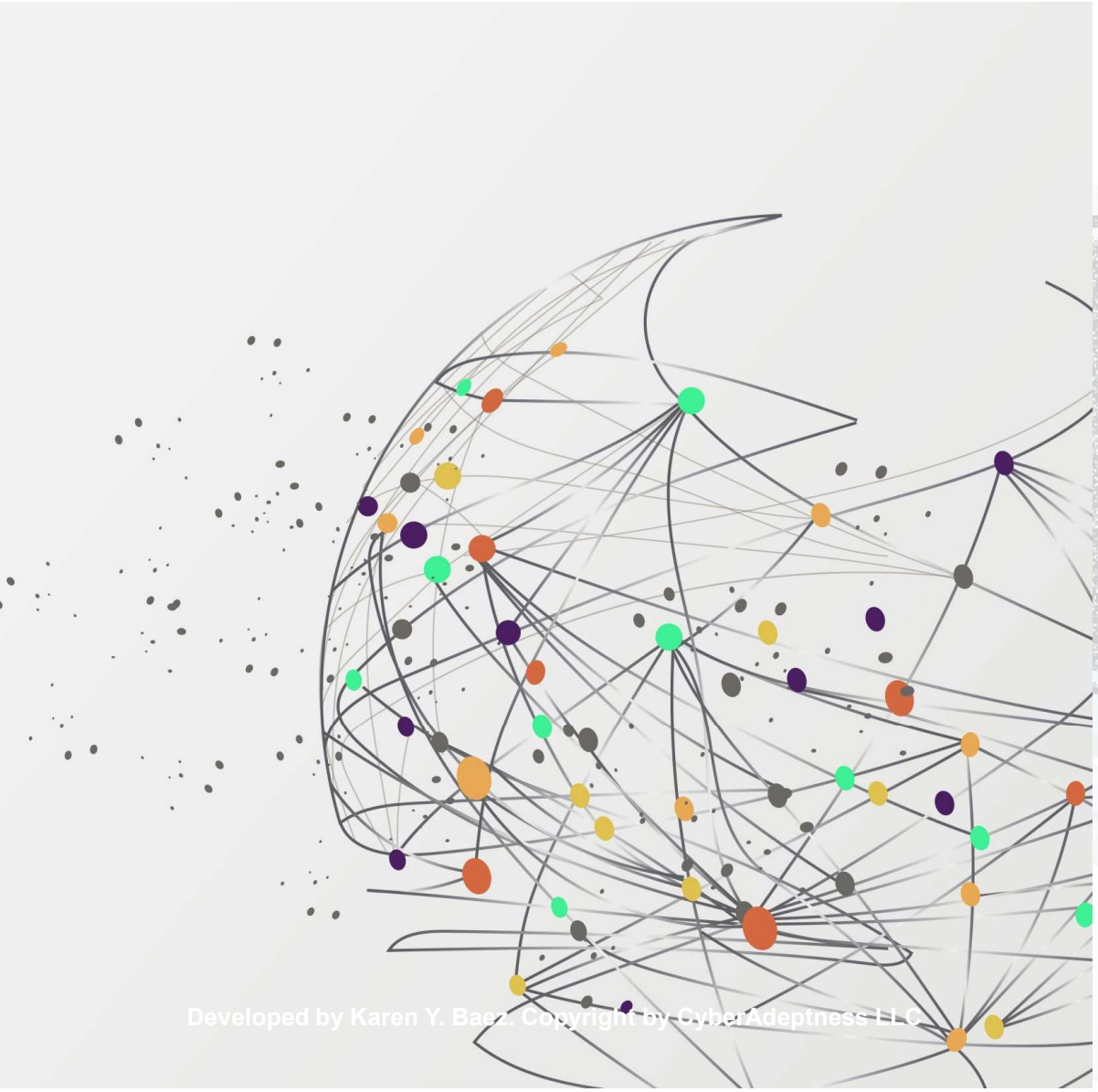
1. When it was purchased specifically for work purposes.
2. When an existing car originally purchased for personal use is modified for a specific work, the modifications may count as an investment.

What types of investments can denote Independent Contractor?

1. The worker's ability to do different types of or more work, reducing cost, or extending market reach.
2. The worker's investments should support an independent business or serve a business-like function.
3. Ability to delineate or make financial decisions for itself without input from the employer.
4. Free to negotiate terms and use equipment to perform work for others.

What types of investments do not denote Independent Contractor?

1. The use of a personal vehicle that the worker already owns to perform work.
2. Leasing a vehicle as required by the employer to perform work.
3. Owning their own tools.



Degree of Permanence of the Work Relationship (§ 795.110(b)(3))

Overview

2/27/2024

What was the proposition addressing the Degree of Permanence of the Work Relationship?

The department proposed that the degree of permanence of the work relationship would "weigh[ ] in favor of the worker being an employee when the work relationship is indefinite in duration or continuous, which is often the case in exclusive working relationships," and that this factor would "weigh[ ] in favor of the worker being an independent contractor when the work relationship is definite in duration, non-exclusive, project based, or sporadic based on the worker being in business for themself and marketing their services or labor to multiple entities."

- The Department noted that independent contractors may have *"regularly occurring fixed periods of work,"* but that *"the seasonal or temporary nature of work by itself would not necessarily indicate independent contractor classification."*
- To further clarify, the Department proposed that *"[w]here a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, rather than the workers' own independent business initiative,"* this would not indicate that the workers are independent contractors. ***[(322) See generally 87 FR 62243–45, 62275 (proposed § 795.110(b)(3))]***
- As the Department noted in the NPRM and in the 2021 IC Rule, *courts and the Department routinely consider the permanence of the work relationship as part of the economic reality analysis under the FLSA to determine employee or independent contractor status.* [1]

1. (323) See **87 FR 62243; 86 FR 1192** (citing a variety of federal appellate case law: **Razak, 951 F.3d at 142; Hobbs, 946 F.3d at 829; Karlson, 860 F.3d at 1092–93; McFeeley, 825 F.3d at 241; Keller, 781 F.3d at 807; Scantland, 721 F.3d at 1312);** see also **WHD Op. Ltr., 2002 WL 32406602, at *3 (Sept. 5, 2002); WHD Op. Ltr., 2000 WL 34444342, at *5 (Dec. 7, 2000) ; WHD Fact Sheet #13**

How do courts typically describe this factor's relevance?

Courts typically describe this factor's relevance as follows:

> ***" 'Independent contractors' often have fixed employment periods and transfer from place to place as particular work is offered to them, whereas 'employees' usually work for only one employer and such relationship is continuous and of indefinite duration."*** [1]

- For example, *a typical employee often has an at-will work relationship with the employer and works indefinitely until either party decides to end that work relationship*. Conversely, *an independent contractor does not usually seek such a permanent or indefinite engagement with one entity.*
- Because of these general characteristics of work relationships, *the length of time or duration of the work relationship has long been considered under the "permanence" factor as an indicator of employee or independent contractor status.*[2]

1. ***(324) Snell, 875 F.2d at 811 (citing Donovan v. Sureway Cleaners, 656 F.2d 1368, 1372 (9th Cir. 1981)); see also Keller, 781 F.3d at 807 (same); WHD Op. Ltr., 2002 WL 32406602, at *3 (Sept. 5, 2002) (same)].***
2. (325) See, e.g., **Parrish, 917 F.3d at 386–87** (noting that one of the relevant considerations under the permanency factor is the total length of the working relationship between the parties); **Capital Int'l, 466 F.3d at 308–09** (in analyzing the degree of permanency of the working relationship, the "more permanent the relationship, the more likely the worker is to be an employee"); **DialAmerica, 757 F.2d at 1385** (finding that "the permanence-ofworking-relationship factor indicates that the home researchers were 'employees' " because they "worked continuously for the defendant, and many did so for long periods of time"); **Pilgrim Equip., 527 F.2d at 1314** ("the permanent nature of the relations between [the employer] and these operators indicates dependence"); see **also Reyes v. Remington Hybrid Seed Co., 495 F.3d 403, 408 (7th Cir. 2007)** (describing an independent contractor as an individual who "appears, does a discrete job, and leaves again"); **Reich v. Circle C. Invs., Inc., 998 F.2d 324, 328 (5th Cir. 1993)** ("[a]lthough not determinative, the impermanent relationship between the dancers and the [employer] indicates non-employee status")]

How does the proposed factor ties to case law?

- Consistent with case law analyzing this factor, *the Department proposed to provide further specificity by noting that an indefinite or continuous relationship is often consistent with an employment relationship, but that a worker's lack of a permanent or indefinite relationship with an employer is not necessarily indicative of independent contractor status if it does not result from the worker's own independent business initiative.* [1]
- The Department also proposed *to continue to recognize that a lack of permanence may be inherent in certain jobs—such as temporary and seasonal work—and that this lack of permanence does not necessarily mean that the worker is in business for themself instead of being economically dependent on the employer for work.*
- For example, *courts have also recognized that the temporary or seasonal nature of some jobs may result in a "lack of permanence . . . due to operational characteristics intrinsic to the industry rather than to the workers' own business initiative."* [2]
- In such instances, a lack of permanence alone is not an indicator of independent contractor status.

1. (326)See, e.g., Superior Care, 840 F.2d at 1060–61; see also AI 2015–1, 2015 WL 4449086, at *10 (withdrawn June 7, 2017)].
2. **(327) Superior Care, 840 F.2d at 1060–61** (citing Mr. W Fireworks, 814 F.2d at 1053–54); see also Flint Eng'g, 137 F.3d at 1442 (finding short duration of work relationships in oil and gas pipeline construction work to be intrinsic to the industry rather than a ''choice or decision" on the part of the workers.

INDEFINITE OR CONTINOUS

Business Relationships

Which commenters agreed with the proposal?

Many commenters agreed with the Department's overall proposal for this factor. See, e.g., AFL–CIO; IBT, LA Fed & Teamsters Locals; NDWA; NELP; NWLC; REAL Women in Trucking; UFCW.

"noted in particular that by relegating the permanence factor to "secondary status," the 2021 IC Rule had negated the significance of "effectively indefinite working relationships" and that the Department's proposal "corrects this issue" by returning the factor to "an equal basis with all other factors."

LA Fed & Teamsters Locals

"concurred that "[a] worker whose work relationship is indefinite or continuous or who is performing a job that is regularly required by the business is more likely to be an employee than a worker who performs work that is definite in duration, project-based, or sporadic."

https://www.nelp.org/

Many commenters also agreed with the portion of the Department's proposal that addressed situations in which a lack of permanency is inherent in the work, such as temporary or seasonal positions, which the Department had proposed as not necessarily indicating independent contractor status if it is not the result of the worker's own business initiative. See, e.g., Gale Healthcare Solutions; LA Fed & Teamsters Locals; LIUNA; NABTU; NELP.

"agreed that a lack of permanence may be due to operational characteristics intrinsic to the industry rather than the workers' own business initiative, and it provided the example of temporary or seasonal forces such as "flu season" that can drive temporary nursing demand in the healthcare industry. It analogized this to the Second Circuit's decision in Superior Care, where temporary nurses' lack of permanence did not preclude them from being employees because "this reflected 'the nature of their profession and not their success in marketing their skills independently.' "

https://galehealthcaresolutions.com/

What was the primary concerns and what legal example denotes the commenters concerns?

Commenters such as Farmworker Justice and the New Mexico Center on Law and Poverty affirmed the importance of recognizing that farmwork can be seasonal and/or temporary, but that this does not weigh against employee status for farmworkers, as many courts have recognized. [1]

1. *(328) As noted in the NPRM, agriculture is an industry where courts often view permanency as working continuously for the duration of a harvest season or returning in multiple years. See, e.g., Paragon, 884 F.3d at 1237 (permanence factor favored employee status because the worker was hired temporarily for the harvest season "[b]ut his employment was permanent for the duration of each harvest season"); Lauritzen, 835 F.2d at 1537 (agricultural harvesters' relationship with employer was "permanent and exclusive for the duration of that harvest season" and permanency was also indicated by the fact that many of the same migrant workers returned for the harvest each year; the court noted that but that fact alo"[m]any seasonal businesses necessarily hire only seasonal employees, ne does not convert seasonal employees into seasonal independent contractors")].*

Which commenters agreed with the proposal? [Cont.]

The primary concern commenters raised about the Department's proposal to consider the degree of permanence of the work relationship as an indicator of employee or independent contractor status *is that a long-term pattern of interaction is valued in business relationships, and that it can indicate the vitality and stability of a business where*, for example, *satisfied long-term clients or customers continue to use their services or contract for particular work*. [See, e.g., CPIE; Fight for Freelancers; N/MA; NRF & NCCR; OOIDA; SIFMA; SHRM; U.S. Chamber.]

"noted that independent contractors may have mutually beneficial business relationships for a long or indefinite time period, which brings into question whether an "indefinite" work relationship is probative of employee status. [1]

CWI and the U.S. Chamber

1. (329) One of the cases relied on by these commenters is Donovan v. Brandel, 736 F.2d 1114, 1117 (6th Cir. 1984), where the court determined that migrant farmworker families who sometimes returned annually to harvest pickles during a 30– 40 day harvest season and ''considered their jobs as migrant farm laborers to be opportunities for supplementing their income if their family situation allowed'' were engaged in a ''mutually satisfactory arrangement'' that was ''no more indicative of the employment relationship than when a businessman repeatedly uses the same subcontractors due to satisfaction with past performance.''

   The Department is careful to note that Brandel is not necessarily representative of the way courts have viewed the permanence factor or employment status of agricultural workers who perform seasonal work, nor were these commenters specifically criticizing the regulatory language proposed by the Department that was almost identical to the language in the 2021 IC Rule recognizing that the short duration of seasonal work such as in agriculture would not necessarily indicate independent contractor classification. See 86 FR 1247 (§ 795.105(d)(2)(ii)); see also, e.g., Lauritzen, 835 F.2d at 1536–37 (noting that Brandel has been ''narrowed and distinguished''); Cavazos v. Foster, 822 F. Supp. 438, 441–42 (W.D. Mich. 1993) (collecting decisions issued after Brandel holding that migrant farmworkers are employees).

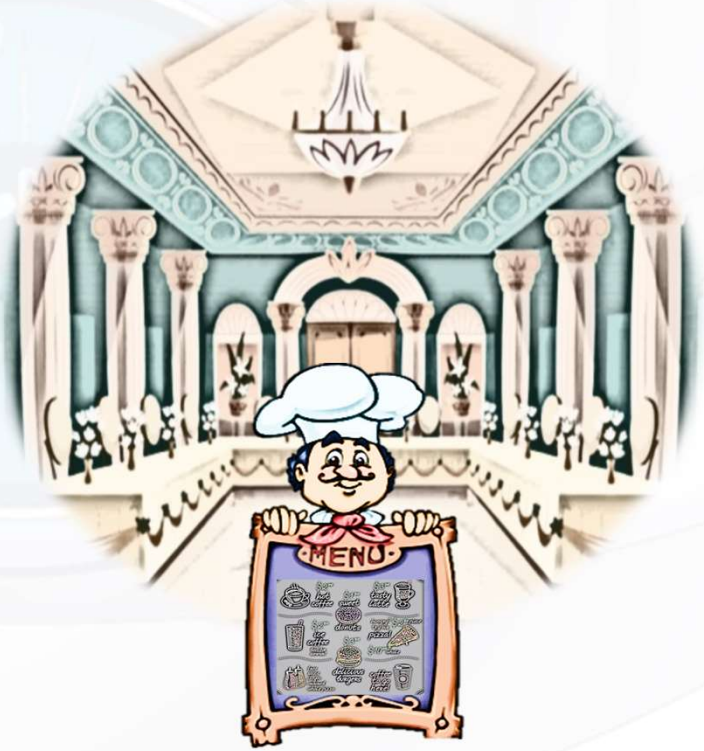
What was the primary concerns of commenters about the proposed text?

- Commenters raising such concerns *did not want the fact that an independent contractor had fostered successful, long-term business relationships to indicate that these economically-independent businesses were actually employees of the entities that continued to use their services*.
- They contended that the analysis should be more nuanced, including CWI's comment that *"as is the case with most aspects of the economic realities analysis, '[t]he inferences gained from the length of time of the relationship depend on the surrounding circumstances.' "*
- The Department agrees that the permanence factor, like other factors in the economic reality test, is best understood in the overall context of the relationship between the parties where all relevant aspects are considered.
- The Department also clearly recognizes and appreciates that people who are in business for themselves often rely on repeat business and long-term clients or customers in order for their business to remain economically viable or successful.
- Thus, the Department notes that the proposed regulatory text does not reduce the permanence analysis to a simple long-term/short-term question.
- Instead, it looks to the general characteristics historically identified by courts and the Department regarding the permanency factor, which indicate employee status where there is a longer-term, continuous, or indefinite work relationship, and independent contractor status where the work is definite in duration, nonexclusive, project-based, or sporadic due to the worker being in business for themself.

What is a good example on how the factor applies to a long-term relationship?

Cook *vs.* Entertainment Venue

A 3- year relationship between a cook who provides specialty meals and an entertainment venue does not automatically result in the cook being an employee of the venue, *particularly where the cook acts as a* "freelancer" *by providing meals intermittently to the venue while marketing their meal preparation services to multiple customers* and the cook can determine whether to provide meals for specific events at the venue based on any reason, including because the cook is too busy with other work.



Will the permanence of a work relationship automatically make workers employees?

- Several commenters *expressed a mistaken belief that having a degree of permanence in a work relationship would automatically make workers employees*, *[see, e.g., N/MA; SBA Office of Advocacy, or that the Department was creating a "per se" rule that work of continuous or indefinite duration equates to employee status, see, e.g., CWI; NRF & NCCR.]*
- Commenters who raised this concern generally asked the Department to either modify the regulatory text or eliminate this factor from consideration.
- However, as the Department has repeatedly explained, *the economic reality test is a totality-ofthe-circumstances test where no one factor is dispositive.*
- Even if the degree of permanence in a work relationship indicates employee status, *this is just one factor that would be considered along with other factors such as control, opportunity for profit or loss, investment, integral, and skill and initiative.*
- The Department does not believe there is a scenario in which, for example, *a worker who controls conditions of employment, sets their own fees, hires helpers, and markets their business is converted from an independent contractor to an employee* solely because they have long-lasting relationships with some clients.

What type of suggestions commenters made and what's the departments response?

"Suggested that the Department note that an employer may manipulate the permanence of a work relationship by firing or terminating a worker, and that if a worker lacks the power to influence their own permanence, this should weigh in favor of employee status."

NELP NATIONAL EMPLOYMENT LAW PROJECT

The Department notes that consideration of whether this type of manipulation to evade the obligations of the FLSA has occurred would seem to be more appropriate in an enforcement situation than in the regulatory text.

"suggested that the Department focus on whether the worker's role or position in a business is long-term, regular, or indefinite, rather than focusing on the individual's tenure, because high turnover of individuals in a particular position does not mean that the position or role within a business is not long-term, but that the job may be economically unsustainable or too dangerous for the worker.

IBT and NELP

- Some commenters suggested clarifications to better capture the permanency factor, in their view.
- The Department agrees that a short-term duration of work may not be indicative of independent contractor status for these and other reasons.
- However, the Department notes that while this factor is known as the "permanency" factor, which could be observed literally by the length of an individual worker's tenure, the regulatory text also provides guidance regarding whether the work was on an indefinite or continuous basis.
- The Department believes that this captures situations where a position began as an indefinite or continuous one but was cut short—without the need to focus on the nature of the position or role within a business.
- Further, the commenters' suggestion is not, to the Department's knowledge, an analysis that has been adopted for this factor by the courts.

Which commenters objected to the department conclusion and what's its response?

"objected to the Department's inclusion of "[w]here a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, rather than the workers' own business initiative, this factor is not indicative of independent contractor status" because it felt this language fails to account for the fact that "many types of independent contractor work are often limited or sporadic in duration precisely because such work is only needed for a discrete period of time" and that "the critical question is whether the worker acted like a business."

CWI

U.S. Chamber of Commerce

"contended that it "makes no difference whether . . . project-to-project work occurs as a result of 'operational characteristics,' " urging the Department to more clearly identify that whether a worker is acting independently is better viewed through the lens of whether the worker chooses "how, when, and the volume of services to provide."

The Department agrees with these commenters that *the critical question is whether the worker is in business for themself*, which is why the proposed regulatory language would require consideration of whether a lack of permanence is due to the workers' own business initiative.

- Commenters such as NABTU and the NDWA supported the Department's proposal in this respect, noting that in industries like construction and home care, employment can be temporary and sporadic, and that consideration of whether the worker exercised independent business initiative was important.
- The Department continues to believe that it is consistent with the case law and relevant to the overall question of economic reality *to consider whether short periods of work are due to workers acting independently to obtain business opportunities or to the operational characteristics of particular industries and the workers they employ.* [1]

1. [(330) See, e.g., Flint Eng'g, 137 F.3d at 1442 (temporary rig welders exhibited sufficient permanency because such temporary work was intrinsic in the industry rather than a "choice or decision" by the workers); Superior Care, 840 F.2d at 1061 (lack of permanence did not preclude temporary nurses from being employees because this reflected "the nature of their profession and not their success in marketing their skills independently"), Mr. W Fireworks, 814 F.2d at 1054 ("in applying the Silk factors courts must make allowances for those operational characteristics that are unique or intrinsic to the particular business or industry, and to the workers they employ").]

What changes did the comments triggered?

- After considering the comments received, the Department finds that a clearer articulation of the final sentence in the proposed regulatory text would be beneficial to employees, employers, independent contractors, and the Department's enforcement staff. Therefore, the last sentence of § 795.110(b)(3) has been rephrased to emphasize whether the worker is exercising their own business initiative:

> ***"Where a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, this factor is not necessarily indicative of independent contractor status unless the worker is exercising their own independent business initiative."*** **(Emphasis added.)**

- The Department believes this formulation makes it clearer that the proper analysis is not categorically based on operational characteristics of particular industries, as some commenters seemed to have read into the proposal, and that it is important to consider whether the worker is exercising independent business initiative with respect to these periods of work.

What's the department's stance on using industry-specific analyses?

- Many commenters suggested industry-specific analyses for the permanence factor. *See, e.g., ACLI (insurance agents); AFL–CIO (platformbased companies); American Securities Association and LPL Financial (financial advisors); MEP (applications on smart phones); NABTU (construction); NAFO (forestry); National Association of Realtors ("NAR") (real estate brokers).*
- Because the Department is promulgating a general rule, it believes that this type of industry-specific guidance would be better suited to potential sub-regulatory guidance.
- The Department agrees that these types of factual analyses would, however, be highly relevant when applying the factors to particular situations and should certainly be considered by parties and factfinders.
- As some commenters noted, however, *see, e.g., CWI and U.S. Chamber*, *the operational characteristics of a particular business or industry would not take precedence over the overall inquiry as to whether, as a matter of economic reality, the worker is in business for themself.*

What is the commenters and the department take on the exclusivity of a work relationship?

- A smaller number of commenters addressed the Department's proposal to recognize that the exclusivity of a work relationship is appropriately considered under the permanency factor and to reject the 2021 IC Rule's approach of considering exclusivity just under the control factor based on whether the worker has the ability to work for others. [1]
- IBT strongly supported the inclusion of this consideration *"because working exclusively for a particular employer clearly speaks to the permanence of the work relationship."*
- Farmworker Justice, LIUNA, and NABTU highlighted the case law discussed in the NPRM *where courts found that working exclusively for a particular employer for the duration of a seasonal or temporary job was indicative of employee status, agreeing that this was the appropriate analysis.* [2]

1. (331) See **87 FR 62244–45**; see, e.g., **Parrish, 917 F.3d at 386–87** (noting that one of the relevant considerations under the permanency factor is whether any plaintiff worked exclusively for the potential employer); **Keller, 781 F.3d at 807** (noting that "even short, exclusive relationships between the worker and the company may be indicative of an employee-employer relationship**"); Scantland, 721 F.3d at 1319** (noting that "[e]xclusivity is relevant" to the permanency of the work relationship); see also WHD Op. Ltr., 2002 WL 32406602, at *3 (Sept. 5, 2002) (considering exclusivity under permanence factor); **WHD Op. Ltr., 2000 WL 34444342, at *5 (Dec. 7, 2000)** (same)].
2. (332) See, e.g., **Lauritzen, 835 F.2d at 1537** (agricultural harvesters' relationship with employer was "permanent and exclusive for the duration of that harvest season"); **Mr. W Fireworks, 814 F.2d at 1054** (the "proper test for determining the permanency of the relationship" in a seasonal industry is "whether the alleged employees worked for the entire operative period of a particular season"); see also **Flint Eng'g, 137 F.3d at 1442** (temporary rig welders' relationship with employer was " 'permanent and exclusive for the duration of' the particular job for which they [were] hired") (quoting **Lauritzen, 835 F.2d at 1537**)].

Should the permanence factor be considered exclusively under the control factor?

- The Coalition of Business Stakeholders, NHDA, and NRF & NCCR commented that they preferred to have exclusivity considered only under the control factor, as in the 2021 IC Rule.
- The Department continues to believe, as discussed in the NPRM, that when analyzing worker classification under the FLSA, all facts that may be relevant to a particular factor should be considered, consistent with the totality-of-the-circumstances approach taken by courts.
- The case law clearly indicates that facts regarding the exclusivity of a work relationship are salient under both the permanence and control factors. In many cases courts considered this under permanence. [1]
- *and in many cases courts consider this under both permanence and control.* [2]
- while a smaller number of cases considered this only as part of a control analysis. [3]
- Because the weight of federal appellate authority does not confine consideration of exclusivity to the control factor, and because the Department has historically viewed exclusivity as relevant to permanence. [4]

1. (334) See, e.g., Hobbs, 946 F.3d at 835; Henderson v. Inter-Chem Coal Co., Inc., 41 F.3d 567, 570 (10th Cir. 1994); Carrell v. Sunland Constr., Inc., 998 F.2d 330, 332, 334 (5th Cir. 1993); Superior Care, 840 F.2d at 1060–61; Lauritzen, 835 F.2d at 1537; DialAmerica, 757 F.2d at 1384.
2. *(335) See, e.g., Parrish, 917 F.3d at 382, 386–87; Keller, 781 F.3d at 807–09, 814; Scantland, 721 F.3d at 1314, 1319; Cornerstone Am., 545 F.3d at 344, 346.]*
3. *(336)* See, e.g., Razak, 951 F.3d at 145–46; Saleem, 854 F.3d at 141].
4. (337) See, e.g., WHD Op. Ltr., 2002 WL 32406602, at *3 (Sept. 5, 2002); WHD Op. Ltr., 2000 WL 34444342, at *5 (Dec. 7, 2000).]

"contended that the permanence factor was redundant with the control factor because the only relevant aspect of the tenure of the parties' relationship is whether the entity contracting with the worker exercised coercion to prevent them from pursuing other business.

American Trucking Association

FSI

"objected that the Department had proposed to include exclusivity under the permanence factor based in part on the weight of the federal appellate case law rather than applying its own independent reasoning

Should the permanence factor be considered exclusively under the control factor? [Cont.]

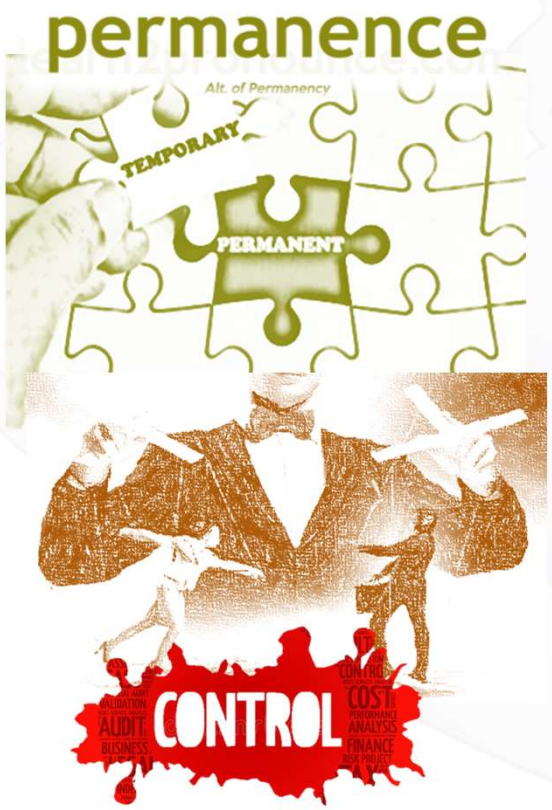
- The Department does not believe it is appropriate to silo these facts under the control factor. [1]

1. (338) The 2021 IC Rule also recognized that some courts analyze the exclusivity of the work relationship as part of the permanence factor, 86 FR 1192, and the Department considered in its NPRM for that rule whether to include exclusivity under the permanence factor and change the articulation to "permanence and exclusivity of the working relationship" in order "to be more accurate," 85 FR 60616, ultimately rejecting an approach that would "blur[ ] the lines" between the factors, 86 FR 1193.

   As explained, upon further consideration of the importance of a totality-of-the-circumstances test where all relevant facts inform the economic dependence determination, the Department believes it is more accurate to consider the exclusivity of the work relationship under both permanence and control factors, especially as it may contribute to a fuller understanding of the parties' work relationship. See Keller, 781 F.3d at 807–09, 814 (explaining that consideration of the control exercised by the business that precluded the worker's ability to work for others "informs our analysis of the permanency and exclusivity of the relationship"); Scantland, 721 F.3d at 1319 ("looking through the lens of economic dependence vel non, long tenure, along with control, and lack of opportunity for profit, point strongly toward economic dependence").

   Courts may find exclusivity to be relevant under other factors as well, consistent with the totality-of-the circumstances approach. See, e.g., Hobbs, 946 F.3d at 833, 835 (finding that the work schedule imposed by the employer prevented workers from engaging in outside work, which was relevant under the opportunity for profit or loss factor as well as the permanence factor).

Should the permanence factor be considered exclusively under the control factor? [Cont.]



- In Keller the court considered the exclusivity of the work relationship under the permanence factor because an exclusive work relationship is a hallmark of the regularity of many employment relationships, and under the control factor because an employer's action that directly or indirectly prevents workers from working for others (thereby imposing an exclusive relationship) is a relevant mechanism of control. ***[(339) See Keller, 781 F.3d at 807–09, 814–15]***
- The Department believes it is appropriate to consider the weight of the case law when providing guidance, as the Department is doing consistently in this rule.
- For these reasons, the Department concludes that exclusivity should remain in the permanence factor and that it may also be considered under the control factor to the extent it speaks to the employer's control.

What did LIUNA suggested and what's the departments response?

- *It suggested certain edits to the proposed regulatory text to better capture, in its view, the case law discussed in the NPRM where courts found that working exclusively for a particular employer for the duration of a seasonal or temporary job was indicative of employee status.*
- It commented that the first sentence of the proposed regulatory text did not properly reflect this case law because it could be read solely as a characterization of work relationships that are indefinite or continuous: "This factor weighs in favor of the worker being an employee when the work relationship is indefinite in duration or continuous, which is often the case in exclusive working relationships."
- It suggested that the Department better align the regulatory text with the case law by substituting the language regarding exclusivity in that sentence with the phrase "or exclusive of work for other employers."
- LIUNA requested further clarifying edits that would remove "project-based" from the general description of work relationships that weigh in favor of independent contractor status in order to add a more specific sentence stating that exclusivity in definite-term, project-based working relationships in industries that require project-based work "such as certain segments of the agricultural or construction industries" is probative of employee status.

1. (340) LIUNA recognized that the Department might be concerned that "more emphatically stating the relationship between permanency and exclusivity would risk suggesting that a non-exclusive working relationship never supports employee status," which it noted would be inaccurate, as the Department discussed in the NPRM. The Department concurs that this would be inaccurate for the reasons discussed in the NPRM and herein, and that clarifying this aspect should not be understood to require an exclusive relationship in order to establish employee status.

- The Department agrees that the concept of exclusivity should not be limited to work relationships that are indefinite or continuous, and that it is more precise and aligned with the case law to substitute the language suggested, which the Department is adopting in this final rule.
- The Department wishes to emphasize, however, *that the disjunctive word "or" is used in the regulatory text, and that it is intended to mean that exclusivity* is not required in order for this factor to weigh in favor of employee status. [1]

Will the department remove the "project-based from the general description of work relationships?

"noted that project-based work can be indicative of employment when it is "regular, repeated, or when it is project-based, but still long-term" and it recommended including in the regulatory text the examples of seasonal or temporary work that were discussed in the NPRM as being consistent with an employment relationship, such as seasonal construction, agriculture, and retail work and temporary staffing agencies."

Outten & Golden

"requested that the Department include additional language from the preamble in the final regulatory text.

Nichols Kaster PLLP

The Department declines this suggestion in the interest of providing succinct statements regarding each factor of the economic reality test in this final rule. The Department notes, however, that the preamble will be accessible for additional information regarding the rule.

- The Department declines to remove "project-based" from the general description of work relationships that weigh in favor of independent contractor status because courts and the Department have associated project-based work with independent contractor status, [1] but it notes that "project-based" work alone is not dispositive of whether this factor weighs in favor of independent contractor status because all considerations relating to the permanence of the work should be considered.
- The Department also declines to add a more specific sentence or examples as requested because the Department has determined that it is not appropriate to address particular industries in this regulation of general applicability.

1. (342) See, e.g., **Henderson, 41 F.3d at 570** (facts that supported an inference that a mechanic was economically dependent on the employer included that he "primarily, if not exclusively" worked for the employer for over three years rather than being hired for a specific repair project); **Carrell, 998 F.2d at 332, 334** (finding welders to be independent contractors where they worked for multiple employers on a project-by-project basis rather than exclusively for one employer); **AI 2015–1, 2015 WL 4449086, at *10** (withdrawn June 7, 2017).

Do exclusive relationships alone determine the economic reality of a working relationship?

"posited that whether a work relationship is exclusive is less illustrative of whether a worker is in business for themself than the reason for the exclusivity, and that where a worker freely chooses to have an exclusive relationship with one transportation provider because of a "satisfying selection of routes or loads that permits the worker to attain financial goals," that worker should "not be judged as less in business for themselves than a worker who contracts with multiple transportation providers."

NHDA

It is essential to LOOK at ALL RELEVANT Factors when analyzing the data. Exclusive Relationships are NOT indicative of the worker's overall classification.

- The Department agrees that an exclusive relationship alone would not be determinative of the economic reality of the working relationship, and that it is important to look at all relevant factors, including factors referenced by the comment such as the worker's opportunity for profit or loss, to aid in the analysis.
- The Department notes that by recognizing that exclusivity weighs in favor of the worker being an employee, *the Department is not stating either that independent contractors can never have exclusive relationships with other businesses or that employees who have nonexclusive relationships with employers because they work multiple jobs become independent contractors*.
- To the contrary, as discussed in the NPRM, although an exclusive relationship is often associated with an employment relationship and a sporadic or project-based, nonexclusive relationship is more frequently associated with independent contractor classification, courts have explained that simply having more than one job or working irregularly for a particular employer does not remove a worker from employee status and the protections of the FLSA.

What case examples provide insight into how the courts address exclusive relationships?

- In Silk, the "unloaders" came to the coal yard "when and as they please[d] . . . work[ing] when they wish and work[ing] for others at will.' [331 U.S. at 706]
- The Court nevertheless determined that the unloaders were employees: "That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act." [Id. at 718]
- Similarly, as the Second Circuit explained in Superior Care, the fact that the temporary nurses "typically work[ed] for several employers," was "not dispositive of independent contractor status" as "employees may work for more than one employer without losing their benefits under the FLSA. [1]
- Courts have also determined that the fact that a worker does not rely on the employer as their exclusive or primary source of income is not indicative of whether an employment relationship exists.[2]

1. **(345) Superior Care, 814 F.2d at 1060**; see also **Saleem, 854 F.3d at 142 n.24** ("It is certainly not unheard of for an individual to maintain two jobs at the same time, and to be an 'employee' in each capacity."); **Keller, 781 F.3d at 808** (agreeing with the Second Circuit that "employees may work for more than one employer without losing their benefits under the FLSA"); **Circle C Invs., 998 F.2d at 328–29** (noting that "[t]he transient nature of the work force is not enough here to remove the dancers from the protections of the FLSA"); **McLaughlin v. Seafood, Inc., 867 F.2d 875, 877 (5th Cir. 1989)** (per curiam) ("The only question, therefore, is whether the fact that the workers moved frequently from plant to plant and from employer to employer removed them from the protections of the FLSA. We hold that it did not."); **Hart v. Rick's Cabaret Int'l, Inc., 967 F. Supp. 2d 901, 921 (S.D.N.Y. 2013)** (noting that "countless workers . . . who are undeniably employees under the FLSA—for example, waiters, ushers, and bartenders"—work for multiple employers).
2. **(346) Superior Care, 814 F.2d at 1060; see also Halferty, 821 F.2d at 267–68** ("it is not dependence in the sense that one could not survive without the income from the job that we examine, but dependence for continued employment"); **DialAmerica, 757 F.2d at 1385** (noting that "[t]here is no legal basis" to say that work that constitutes a second source of income indicates a worker's lack of economic dependence on a job because the proper analysis is "whether the workers are dependent on a particular business or organization for their continued employment").

How has the sixth court handle cases in which the worker has more than one source of income?

- The Sixth Circuit explained: *"[W]hether a worker has more than one source of income says little about that worker's employment status.*
- Many workers in the modern economy, including employees and independent contractors alike, must routinely seek out more than one source of income to make ends meet." [1]

1. **(347) Off Duty Police, 915 F.3d at 1058**. The 2021 IC Rule correctly noted that a handful of cases improperly conflate having multiple sources of income with a lack of economic dependence on the potential employer. See **86 FR 1173, 1178**. The 2021 IC Rule characterized such a "dependence-forincome" analysis as incorrect and a "dependencefor-work" analysis as correct. Id. at 1173. This critique continues to be valid, as is the observation that "[i]t is possible for a worker to be an employee in one line of business and an independent contractor in another." **Id. at 1178 n.19.**

What's the department stance on workers with multiple jobs?

Commenters supported the Department's clarification in the NPRM, which the Department reiterates here, that exclusivity is not required in order to find a degree of permanence and that working multiple jobs does not necessarily favor independent contractor status—particularly because, as the Sixth Circuit noted, many workers' financial needs require them to have multiple sources of income. [See, e.g., IBT; LCCRUL & WLC; NELP.]

"described a current client who "often has to work for a variety of gig economy jobs simultaneously, such as Uber Eats, GoPuff, Instacart, and Caviar, to keep her finances afloat."

LCCRUL & WLC

"observed that in "low-wage industries, particularly in services such as transportation, delivery, or home care, many workers juggle multiple jobs with multiple entities not as an exercise of their own business judgment but as a necessity to cobble together a living wage in an underpaying economy."

NELP

- The Department noted in the NPRM that where workers provide services under a contract that is routinely or automatically renewed, courts have determined that this indicates permanence and an indefinite working arrangement associated with employment. [1]
- The proposed regulation noting that work relationships that are indefinite in duration or continuous weigh in favor of employee status is consistent with this case law.
- Some commenters mistakenly believed that the regulatory text explicitly stated that contractual renewals equate to employee status and objected for largely the same reasons commenters objected to their reading of the proposed regulatory text to imply that businesses could not have long-term relationships with clients without being considered employees of their clients, to which the Department responded above. See Fight for Freelancers; NRF & NCCR.

1. (348) See, e.g., **Brant, 43 F.4th at 672** (stating that "[a]utomatic [contract] renewal would weigh more heavily in favor of employee status"); **Scantland, 721 F.3d at 1318** (finding one-year contracts that were automatically renewed to "suggest substantial permanence of relationship"**); Pilgrim Equip., 527 F.2d at 1314** (finding laundry operators' one-year contracts that were routinely renewed indicated employee status); **Acosta v. Senvoy, LLC, No. 3:16– CV–2293–PK, 2018 WL 3722210, at *9 (D. Or. July 31, 2018)** (noting that one-year contracts that automatically renew are "evidence that a worker is an employee"); **Solis v. Velocity Exp., Inc., No. CV 09–864–MO, 2010 WL 3259917, at *9 (D. Or. Aug. 12, 2010)** (the fact that package delivery drivers understood their contracts to be of indefinite duration and that contracts were routinely renewed without renegotiation indicated employee status).

What's the department's final decision after reviewing the comments?

The Department is finalizing the permanence factor (§ 795.105(b)(3)) with the modifications discussed herein. The following is an example on the Degree of Permanence of the Work Relationship.

EMPLOYEE

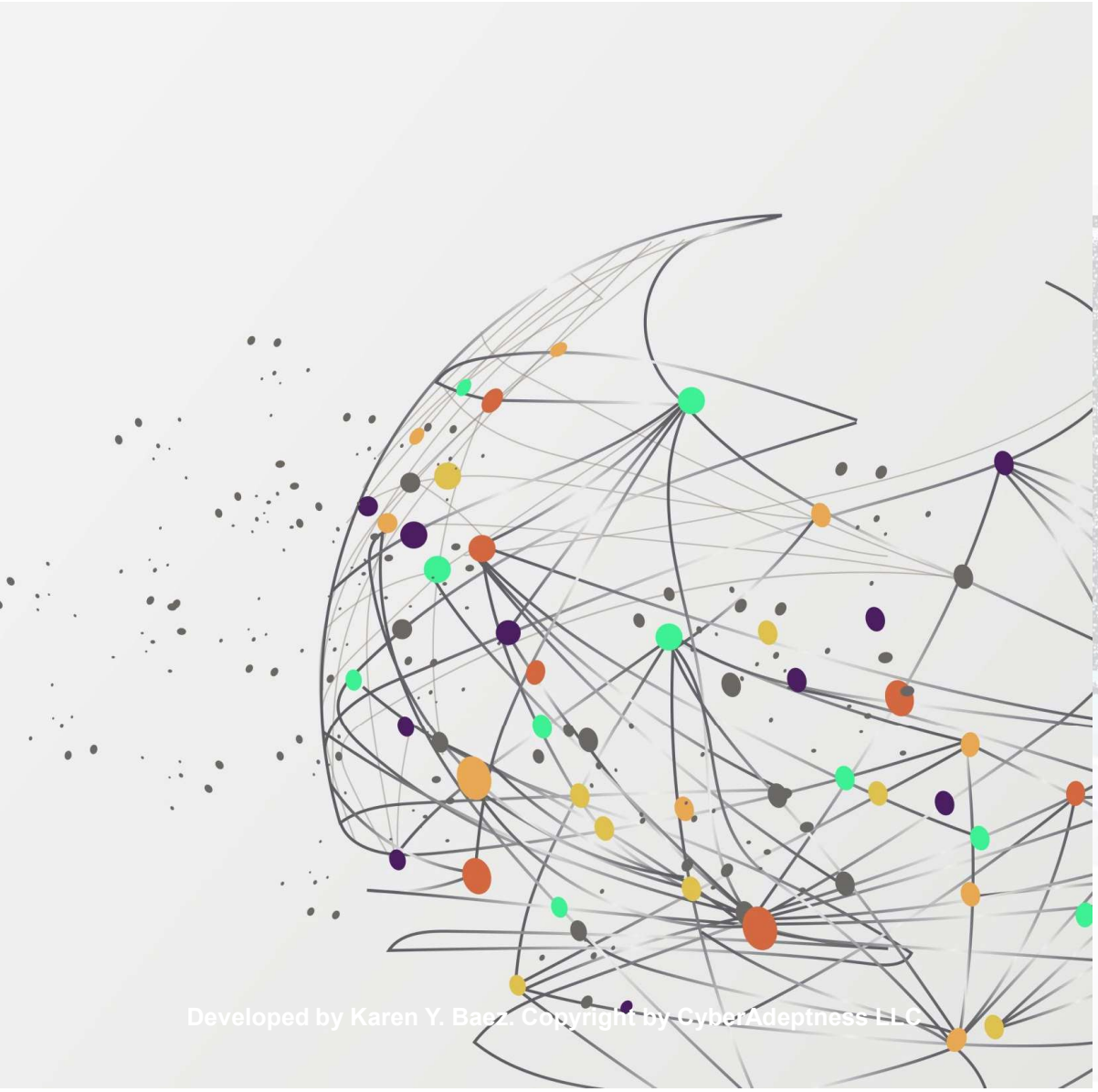
- A cook has prepared meals for an entertainment venue continuously for several years.
- The cook prepares meals as directed by the venue, depending on the size and specifics of the event.
- The cook only prepares food for the entertainment venue, which has regularly scheduled events each week.
- The relationship between the cook and the venue is characterized by a high degree of permanence and exclusivity.
- These facts indicate employee status under the permanence factor.

Independent Contractor

- A cook has prepared specialty meals intermittently for an entertainment venue over the past 3 years for certain events.
- The cook markets their meal preparation services to multiple venues and private individuals and turns down work for any reason, including because the cook is too busy with other meal preparation jobs.
- The cook has a sporadic or project-based nonexclusive relationship with the entertainment venue.
- These facts indicate independent contractor status under the permanence factor.

What determines the permanency of relationship according to the department?

1. ***An indefinite or continuous relationship is often consistent with an employment relationship***
2. xx
3. xx
4. xx



Nature and Degree of Control (§ 795.110(b)(4))

Overview-pg.53

2/27/2024

What was the departments proposal on the nature and degree of control?

1 **Modification of section § 795.105(d)(1)(i), which considered control as a "core" factor in the economic reality test.**

- The 2021 IC Rule assessed the employer's and the worker's "substantial control over key aspects of the performance of the work," which included setting schedules, selecting projects, controlling workloads, and affecting the worker's ability to work for others. **[(349)See 86 FR 1246–47 (§ 795.105(d)(1)(i)).]**
- The 2021 IC Rule also stated that "[r]equiring the individual to comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms that are typical of contractual relationships between businesses . . . does not constitute control" for purposes of the economic reality test. **[(350) Id. at 1247 (§ 795.105(d)(1)(i))]**
- In its proposal and consistent with the 2021 IC Rule, the Department explained that it continues to believe that issues related to scheduling, supervision over the performance of the work (including the ability to assign work), and the worker's ability to work for others are relevant considerations in evaluating the nature and degree of control.

2 **Consideration of additional aspects of control in the workplace.**

The Department's proposal also considered additional aspects of control in the workplace that have been identified in the case law or through the Department's enforcement experience— such as control mediated by technology or control over the economic aspects of the work relationship. However, as noted above, the Department's proposal did not elevate control as a "core" factor in the analysis. [See supra section III.A]

3 **A textual addition requiring employer's contractual obligations to be met.**

In addition, and contrary to the 2021 IC Rule, the Department's proposed regulation included a sentence stating that an employer's compliance with legal obligations, safety or health standards, or requirements to meet contractual or quality control obligations, for example, may indicate that the employer is exerting control, suggesting that the worker is economically dependent on the employer.

Overview of Control Factor

What was commenters feedback on the control factor?

- Commenters from across the spectrum agreed that control was a highly relevant factor to the economic reality analysis. See, e.g., Gig Workers Rising; U.S. Chamber.
- Some commenters objected to the Department's proposed text that shifted the focus of this factor back to the nature and degree of control exerted by the potential employer, rather than by the worker.
- The 2021 IC Rule described the factor as considering the worker's and the potential employer's nature and degree of control, while the NPRM described the factor as considering primarily the potential employer's nature and degree of control. ***[(352) 86 FR 1180; 87 FR 62275 (proposed § 795.110(b)(4))]***

"a worker's right to control the manner and means by which a worker provides services is, and should remain, a primary consideration in the Department's discussion of the right to control factor."

N/MA

CWI

"described this aspect of the proposal as "misguided" because "[f]ocusing on the individual's control ensures that the totality of the worker's business are evaluated, including control the worker may have over whether to subcontract, how to manage his workforce, whether and how to advertise his services, and whether to prioritize, stagger, or overlap projects." It added that such "considerations are largely lost when the analysis is unduly narrowed to an evaluation of an individual putative employer's alleged control."

"Instead of focusing on the control a worker exercises over their work (which would evidence that they are in business for themselves), the Department would rather determine 'employee' status on the employer's generally considered control over the work."

NAM

In contrast, other commenters agreed with the Department's returned focus on the nature and degree of the potential employer's control.

"stated that the "case law is clear that the appropriate focus for this factor must be on the employer's control over the worker, and not the worker's control over the work."

State AGs

the NPRM "helpfully clarifies that a hiring entity/employer who has the ability to control key aspects of the work is likely an employer."

Farmworker Justice

What was commenters feedback on the control factor? [Cont.]

"criticized the Department's proposal for eliminating the 2021 IC Rule's "express requirement of 'substantial' control."

Scalia Law Clinic

"inclusion of reserved control is "the appropriate interpretation of the control factor and properly accounts for the variety of today's work arrangements."

State AGs

"business commenters generally disagreed with the inclusion of reserved control, stating that that this broadened the control factor and introduced additional uncertainty by using this "undefined, vague terminology."

U.S. Chamber; see also CWI

"discounting contractual or reserved control is inconsistent with congressional intent to expand the coverage of the FLSA beyond the narrow confines of common law employment"

AFL–CIO

A very large proportion of the comments received regarding the control factor addressed the proposal that an employer's compliance with legal obligations, safety or health standards, or requirements to meet contractual or quality control obligations may indicate control, suggesting that the worker is economically dependent on the employer. Many commenters objected to this proposal.

"Legally required control is generally disregarded since that is control imposed by the government, not by the client or hiring party. The client or hiring party is not choosing to exercise legally required control; it is required to do so."

FLEX

See also Richard Reibstein, publisher of legal blog.

"[r]equiring an independent contractor to comply with legal obligations, safety standards, contractual obligations, or industry standards should not be indicative of control" because "[t]hese requirements are standard in contracts and subcontracts."

WFCA and others commented

See also Genesis Timber; National Association of Home Builders ("NAHB"); NRF & NCCR

What was commenters feedback on the control factor? [Cont.]

Other commenters stated that the Department's proposal *would disincentivize employers to prioritize safety and other beneficial policies, because employers would not want to risk workers being classified as employees*. See, e.g., Kentucky Trucking Association; Southeastern Wood Producers Association, Inc.

"workers and businesses should not be discouraged from incorporating contractual terms that "support sound, lawful, safe work practices," as those terms do not evidence control over the worker by the business under the Act's economic realities test. "

U.S. Chamber

SHRM

" stated that this aspect of the NPRM "will deter some companies from upholding their obligations in this respect by holding the specter of a misclassification finding over their heads for simply trying to do right by the people who make their businesses viable."

"this aspect of the NPRM "would effectively encourage businesses to avoid measures encouraging legal compliance and the safety of both independent workers and the public generally, so that they do not increase their risk of misclassification claims"

CWI

"[t]he Department should recognize that [supervision in order to comply with regulatory requirements] . . . helps my firm and me stay compliant with securities law and should not be viewed as a negative factor when determining my status under the [FLSA]."

multiple financial advisors submitted identical comments stating that

"all businesses operate against regulatory backdrops and posited the following example: "a regulation might require all people on a construction site to wear a hard hat. The builder might, therefore require site visitors, including the eventual tenant, to wear hardhats. Is the eventual tenant now the builder's employee based [on] the exercise of control over a worksite?"

WPI

In its NPRM, the Department explicitly addressed this scenario, stating that "if an employer requires all individuals to wear hard hats at a construction site for safety reasons, that is less probative of control." 87 FR 62248.

What was commenters feedback on the control factor? [Cont.]

Some heavily regulated industries in particular expressed concern about this proposed provision, including the trucking, financial services, insurance, and real estate industries.

" opposed this proposed language as well, and further commented that the proposed regulatory language "lacks all of the context provided in the preamble" and that, "[i]f the Department's intent is to make clear that there 'may' be 'some cases' in which compliance with legal, safety, or quality control obligations 'may' be relevant, then the rule should say that and should provide the full context contained in the narrative."

FLEX

"the proposal to consider compliance with legal, safety, or quality control obligations as employer-like control indicative of an employee relationship is untenable in the highly regulated trucking and logistics industries and any rollback of requirements for owner-operators to comply with such obligations will almost certainly lead to less safe roads in our Nation."

Scopelitis

"[i]t is important for the highly regulated securities industry that independent contractors do not morph into employees merely because they must remain in compliance with federal and state securities, banking, and insurance laws."

SIFMA

"[w]hile there may be some degree of control over an individuals' work within broker-agent relationship as required by state law, the manner in which that work is completed—at the individuals' broad discretion, for example—is a critical distinction that should not weigh in favor of classification as an employee."

NAR

"included a number of contractual provisions in their comment and stated that the Department "has a duty to address each one in the context of any final rule as to whether it amounts to control."

Pennsylvania Motor Truck Association

The Department cannot opine on a particular employer's discrete contractual provisions in a final rule. As stated in the 2021 IC Rule, "it is not possible—and would be counterproductive—to identify in the regulatory text every type of control (especially industry-specific types of control) that can be relevant when determining under the FLSA whether a worker is an employee or independent contractor." 86 FR 1182.

ACLI

"[i]t also would place at risk the careful balance that the courts and legislatures have fashioned in confirming the importance and viability of independent contractor models while ensuring regulatory compliance to protect the public."

What was commenters feedback on the control factor? [Cont.]

Other commenters supported this proposed provision.

"explained that there are basic legal obligations for anyone involved in publishing, such as contract provisions that prohibit libel or theft of copyrighted material, and that such terms are "not indicative of a business's control over how, when and where an article is written.'

Fight for Freelancers

"commented that the very fact that a government entity or court "imposes an obligation on an entity to ensure a workplace or a set of workers complies with law strongly suggests that responsible government officials believe that the entity stands in a relationship with the workers such that it is appropriate for it to do so."

AFL-CIO

NELA

"When the employer, rather than the worker, controls compliance with legal, safety, or other obligations, it is evidence that the worker is not in fact in business for themselves because they are not doing the risk-management work involved in understanding and adhering to the legal and other requirements that apply to the work they perform and are not assuming the risk of noncompliance."

"The Department should explain that if a government agency or other entity looks to the hiring entity for compliance, that fact alone suggests that the hiring entity has the requisite control to demand compliance."

NELA

ROC United

"commented that it was "an appropriate correction of the 2021 Rule" because delivery companies tend to exert control with respect to customer service standards and that "monitoring of drivers' compliance is indicative of the control [those companies] has over them."

"commenting that the regulation should state that controls implemented by the employer to comply with legal obligations, safety standards, or contractual or customer service standards provides a strong indication of employee status"

A Better Balance; Outten & Golden

What is the departments position after reviewing the comments?

"supported this provision of the proposed regulation and further commented that the Department should explain that certain industries "are so highly regulated such that it is inherent in the nature of the work that the company must comply, and exercise control to require their workers to comply, with legal and safety regulations" and that in such circumstances the use of independent contractors is "likely inappropriate."."

Intelycare

- Upon consideration, the Department is adopting proposed § 795.110(b)(4) with several revisions in response to comments received. For decades, courts and the Department have taken the view that the control factor represents one facet of the economic reality test. [1]
- As noted in the NPRM, the Department continues to believe *that control should be analyzed in the same manner as every other factor*, rather than take an outsized role when analyzing whether a worker is an employee or independent contractor.
- As the Fifth Circuit stated in 2019, it "is impossible to assign to each of these factors a specific and invariably applied weight." [2]
- Regarding comments critiquing the Department's proposed regulatory text shifting the focus of this factor back to the nature and degree of control exerted by the potential employer rather than by the worker, the Department declines to make any alterations to this proposed text.

1. (355) See, e.g., **WHD Op. Ltr. (Aug. 13, 1954)** (applying six factors, of which control was one, that are very similar to the six economic reality factors currently used by almost all courts of appeals); **Shultz v. Hinojosa, 432 F.2d 259, 264–65 (5th Cir. 1970)** (affirming judgment in favor of Secretary of Labor that slaughterhouse worker was an employee under the FLSA under a multifactor economic reality test of which control was one of the factors).]
2. **(356) Parrish, 917 F.3d at 380** (quotation marks and citation omitted). The federal courts of appeals have taken this position for decades. See also, e.g., **Scantland, 721 F.3d at 1312 n.2** (the relative weight of each factor "depends on the facts of the case") (citation omitted); **Selker Bros., 949 F.2d at 1293** ("It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . [, and] neither the presence nor the absence of any particular factor is dispositive.").

What is the root of control from a legal perspective?

The DEGREE of the alleged employer's right to control the manner in which the work is to be performed.

- The control factor has its roots in the common law, where the inquiry was whether the "employer" had the "right to control the manner and means by which [work] is accomplished." [Reid, 490 U.S. at 751]
- Courts have consistently, and for decades, considered this factor with the focus on the potential employer, not the worker. [1]
- Congress and the Department have also historically focused on the control exerted by the potential employer (until the 2021 IC Rule).
- In the House Report accompanying the 1966 FLSA Amendments, for example, Congress described the factor as *"[t]he degree of control which the principal [potential employer] has in the situation"* and then affirmed that the "committee fully subscribes to these criteria."[2]

1. [Turned into footnote for better understanding] See, e.g., **Saleem, 854 F.3d at 141** ("[A] company relinquishes control over its workers when it permits them to work for its competitors."); **Razak, 951 F.3d at 142** (phrasing the factor as "the degree of the alleged employer's right to control the manner in which the work is to be performed"); **McFeeley, 825 F.3d at 241** (phrasing the factor as the ***"****degree of control that the putative employer has over the manner in which the work is performed"*); **Karlson, 860 F.3d at 1093** (phrasing the factor as *"the degree of control exercised by the alleged employer over the business operations"*); **Flint Eng'g, 137 F.3d at 1440** (stating that, when *"applying the economic reality test, courts generally look at (1) the degree of control exerted by the alleged employer over the worker*"**); Scantland, 721 F.3d at 1316** (explaining that *"[t]he economic reality inquiry requires us to examine the nature and degree of the alleged employer's control*").
2. (358) See **House Report No. 871, 89TH CONG., 1ST SESS., at 43 (1965).** It is clear that Congress was referring to a potential employer by the use of the term *"principal"* because its articulation of the integral factor in the same section stated: "The extent to which the services rendered are an integral part of the principal's business." In contrast, its articulation of the initiative factor stated: "The initiative, judgment, or foresight exercised by the one who performs the services." Id. (emphases added).

What is the appropriate focus for this factor?

The focus of this factor should be on the potential employer. The focus shall be on whether the employer controls meaningful economic aspects of the work relationship because that focus is probative of whether the worker stands apart as their own business.

- Simply assessing whether the employer lacks control over discrete working conditions (e.g., scheduling) or whether the employer exercises physical control over the workplace does not fully address whether the employer controls meaningful economic aspects of the work relationship. [1]
- Specifically, the Fifth Circuit applied this analytical approach in a case where an insurance sales firm not only "controlled the hiring, firing, assignment, and promotion of the [workers' subordinates]," but also controlled how the workers priced the insurance products, received leads for sales, and defined the territory in which the agents could sell products. [2]
- These actions made it clear that the employer, *and not the workers*, retained meaningful control over the "economic aspects of the business," suggesting that the workers were employees. ***[(362) Id. at 343]***

1. (360) See, e.g., **Cornerstone Am., 545 F.3d at 343– 44** (finding that control weighs in favor of employee status even where the employer disclaims control over "day-to-day affairs" of the workers because the employer controlled the meaningful economic aspects of the work). Other elements may also be included in this examination of control, such as those identified by the Supreme Court in Whitaker House. They include whether the worker could sell their products or services "on the market for whatever price they can command;" whether the worker's compensation was dictated by the employer; and whether management could fire the worker for failure to obey its regulations. **366 U.S. at 32–33**.
2. **(361) Cornerstone Am., 545 F.3d at 343–44**.

What is the appropriate focus for this factor? [Cont.]

- The Third Circuit has similarly held that even though dancers had some scheduling flexibility, the control factor weighed in favor of employee status because the employer, and not the workers, controlled the economic aspects of the dancers' work, such as the price of services, the clientele to be served, and the operations of the club in which they worked. ***[(363) Verma, 937 F.3d at 230.]***
- Regarding the comments received addressing the scope of the control factor such as whether reserved control should be included or whether the regulation should require "substantial" control, the Department declines to make the changes requested.
- First, the Department believes that the reference to reserved control should remain in the regulation as proposed. Control can certainly be exerted directly in the workplace by an employer, such as when it sets a worker's schedule, compels attendance, or directs or supervises the work. [1]
- As explained in the NPRM and addressed fully in section V.D. of this final rule, however, *the absence of these more apparent forms of control does not invariably lead to the conclusion that the control factor weighs in favor of independent contractor status.* [2]

1. See, e.g., **Scantland, 721 F.3d at 1314** (finding workers to be employees, in part, because they "were subject to meaningful supervision and monitoring by" their employer).
2. (365) See, e.g., **Mr. W Fireworks, 814 F.2d at 1049** ("[T]he lack of supervision over minor regular tasks cannot be bootstrapped into an appearance of real independence.") (citation omitted); **Antenor, 88 F.3d at 934** (noting in FLSA joint employment case that the Act reaches even those employers who "[do] not directly supervise the activities of putative employees"). **This has been the Department's perspective for almost 6 decades**. See **WHD Op. Ltr., FLSA–795, at 3 (Sept. 30, 1964)** (determining that professional divers were employees of a diving corporation, despite the lack of control over their work, by noting "that persons may be employees within the meaning of the Act even though they are unsupervised in their work, are not required to devote any particular amount of time to their work,[and] are under no restriction not to work for competitors of the employer").

Will the modification required that the employer must have *"substantial control"*? [Cont.]

- Employers may also exercise control in other ways, including reserved rights to control, because such reserved rights may, in some situations, be probative of the economic reality of the total situation.
- Second, the Department declines to modify the regulation to require "substantial control" as requested by the Scalia Law Clinic.
- The Department does not believe such a modifier is appropriate in the regulatory text because the totality of the circumstances must be considered, and this heightened requirement is not supported by case law.
- Of course, substantial control can be indicative of employee status as several cases have held, but "substantial control" is not a predetermined requisite under the economic reality test. [1]
- Moreover, as the regulatory text provides, *"[m]ore indicia of control by the potential employer favors employee status; more indicia of control by the worker favors independent contractor status."* ***[(367) 29 CFR 795.110(b)(4).]***
- Thus, substantial control by the employer would clearly favor employee status, though it is not required. [2]

1. (366) For example, in Driscoll, the Ninth Circuit described the control factor as the "degree of the alleged employer's right to control the manner in which the work is to be performed" but then concluded that the employer possessed "substantial control over important aspects" of the workers' work. **603 F.2d at 755**.
2. (368) The Department also received comments urging it to delete this sentence of the proposed regulatory text. See NELP; Outten & Golden. These commenters expressed concern that the concluding sentence suggested a relative weighing of facts relevant to control in lieu of a "totality of the circumstances" analysis, and that this "implies a simple arithmetic tallying of the various listed facts" that would "invite an unnecessary contest that threatens to overshadow the purpose of the factor." The Department declines to delete this sentence because it believes that considering the various indicia of control and whether they weigh in favor of employee or independent contractor status can be a helpful analytical tool. However, the Department agrees that the correct analysis is an overall, qualitative analysis, and that the considerations described within the control factor should not be used as a checklist or in a "tallying" fashion, just as the economic reality factors should not be tallied but rather considered based on the totality of the circumstances.

What's is the departments final stance on the control factor? [Cont.]

- Finally, current § 795.105(d)(1)(i) states that an employer requiring a worker to *"comply with specific legal obligations, satisfy health and safety standards, carry insurance, meet contractually agreed-upon deadlines or quality control standards, or satisfy other similar terms . . . does not constitute control* that makes the [worker] more or less likely to be an employee." ***[(369) 86 FR 1247 (§ 795.105(d)(1)(i))]***
- In the NPRM, the Department explained that *a blanket prohibition on consideration of compliance with legal or other obligations would not be appropriate, and that certain instances of control should not be excluded as irrelevant to the economic reality analysis only because they are required by business needs, contractual requirements, quality control standards, or legal obligations*.
- Moreover, the Department recognized that the "case law is not uniform on this issue" and undertook a detailed discussion explaining why a complete bar to ever considering such compliance with legal, safety, or health obligations, or quality control measures *would be inappropriate under the economic reality test*.
- The Department took a more nuanced approach in the preamble discussion than some commenters recognized in their comments, and it continues to find cases such *as Scantland and others*— which recognize that compliance with legal or contractual obligations or quality control may be relevant evidence of control—*persuasive and more consistent with a totality-of-thecircumstances, economic reality analysis.* [1]

1. (370) As the **Eleventh Circuit** explained in **Scantland**, the "economic reality inquiry requires us to examine the nature and degree of the alleged employer's control, not why the alleged employer exercised such control." **721 F.3d at 1316** (emphasis added). The court continued to explain that if "the nature of a business requires a company to exert control over workers to the extent that [the employer] has allegedly done, then that company must hire employees, not independent contractors." Id.; see also **Schultz v. Mistletoe Express Serv., Inc., 434 F.2d 1267, 1271 (10th Cir. 1970)** (noting that "arguments that an independent contractor relationship is shown by . . . the need to comply with the regulations of federal and state agencies do not persuade us" before affirming the conclusion that workers were employees under the FLSA).

How would this apply when employers and workers must comply with legal requirements?

- The NPRM explained explicitly and with detail that compliance with legal requirements may not always be relevant to control, and that such compliance was only one facet of control.
- However, the Department takes seriously the many comments received from stakeholders about the proposed regulatory language, the legitimate points they raised, and the concerns commenters expressed, even though the Department does not necessarily agree with all issues raised.
- In the NPRM, the Department was cognizant of the challenge of setting forth a regulation that would capture all of the facts relevant to the nature and degree of a potential employer's control while balancing the practical considerations of the way businesses, particularly in some industries, must simultaneously comply with a host of legal, regulatory, and business-related demands.
- While the Department sought to strike the suitable balance between these two concerns in the NPRM, the comments have persuaded the Department that the provision as proposed may lead to unintended consequences due to stakeholder confusion and uncertainty.
- The Department does not agree, however, with commenters who stated that the Department's proposed regulatory text would make compliance with the law a "negative factor."
- As noted by commenters, businesses already must comply with various legal and regulatory requirements—for example, from the IRS, state licensing boards, and city ordinances.

What's is the departments final stance on the control factor? [Cont.]

- Additionally, the Department never had a blanket prohibition prior to the 2021 IC Rule on the consideration of compliance with legal obligations, and none of the mass uncertainty or noncompliance with legal norms suggested by commenters were apparent. [1]
- Nevertheless, the Department recognizes the confusion evident in the comments regarding this provision.
- The Department agrees with commenters, for example, that stated that a publication's required compliance with libel law for a writer is not probative of a worker's economic dependence on that publication but if the publication instructed how, when, and where the work is performed, that is relevant to the control analysis.
- To provide another example, a home care agency requiring a criminal background check for all individuals with patient contact in compliance with a specific Medicaid regulation requiring such checks would not be indicative of control.
- Accordingly, the Department is revising the regulation to state *that "actions taken by the potential employer for the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation are not indicative of control."*

1. (371) For example, in a 2014 Administrator's Interpretation "Joint employment of home care workers in consumer-directed, Medicaid-funded programs by public entities under the Fair Labor Standards Act" (withdrawn in 2020), the Department stated that "under an economic realities analysis, all of the facts and circumstances of the relationship between a provider and the state must be evaluated, and no single factor is determinative. Relevant factors that must be considered when evaluating whether a state administering a consumer-directed program is an employer include the various legal requirements with which consumer-directed programs must comply, and how programs choose to comply with those requirements." See **Administrator's Interpretation 2014–2, available at 2014 WL 2816951, at *5**; see also **Administrator's Interpretation 2015–1, available at 2015 WL 4449086, at *12** ("Some employers assert that the control that they exercise over workers is due to the nature of their business, regulatory requirements, or the desire to ensure that their customers are satisfied. However, control exercised over a worker, even for any or all of those reasons, still indicates that the worker is an employee.").

What's is the departments final stance on the control factor? [Cont.]

- The Department is further revising the regulation to state that *"actions taken by the potential employer that go beyond compliance with a specific, applicable Federal, State, Tribal, or local law or regulation and instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards may be indicative of control."*
- This part of the regulatory text means that a potential employer's control over compliance methods, safety, quality control, or contractual or customer service standards that goes beyond what is required by specific, applicable Federal, State, Tribal, or local law or regulation may in some—*but not all— cases be relevant to the analysis of a potential employer's control if it is probative of a worker's economic dependence.*
- For example, in contrast to the background check example in the prior paragraph, *a home care agency's extensive provider qualifications, such as fulfilling comprehensive training requirements (beyond training required for relevant licenses), may be probative of control.*
- The Department continues to believe that control exerted by the employer to achieve these *ends may be relevant to the underlying analysis of whether the worker is economically dependent on the employer, particularly where the employer dictates and enforces the manner and circumstances of compliance.*
- These instances of potential control, however, *are relevant only if probative of the worker's economic dependence, as with any other consideration under the economic reality factors.*

What's is the departments final stance on the control factor? [Cont.]

- For example, when an employer, rather than a worker*, imposes safety or customer service obligations beyond what is required by specific, applicable Federal, State, Tribal, or local law or regulations*, it may be evidence that the worker is not in fact in business for themself.
- In those instances, they are not doing the entrepreneurial tasks that suggest that they are responsible for understanding and adhering to requirements that apply to the work or services they are performing such that they are assuming the risk of noncompliance—a typical and expected risk that workers in business for themselves regularly assume.
- Moreover, the Department understands that parties *representing a wide array of business relationships enter into contracts,* and this regulation should not inhibit those practices.
- For example, if a potential employer requires all workers to sign a contract acknowledging that the business's general policy is that invoices for work projects *must be submitted within a particular timeframe, this is not indicative of control because such a generally applicable contractual term does not itself suggest that* a worker is economically dependent on the employer for work.
- In contrast, if a potential employer requires all workers to sign a contract outlining specifically how, when, and where the work must be performed, that specific direction would be indicative of control because it suggests that the workers are not operating independently.
- The Department believes that this revised text will be able to encompass control that is relevant *to the overall analysis of economic dependence* while providing businesses with a clear rule regarding compliance with specific legal obligations.

What's is the departments final stance on the control factor? [Cont.]

- As the Department emphasized in the NPRM and again emphasizes here, *the facts and circumstances of each case must be assessed, and the manner in which the employer chooses to implement such obligations will be highly relevant to the analysis.* For example, under this final regulatory text, *it is not indicative of control if a potential employer requires everyone who enters a construction site to wear a hard hat* as required by city ordinance.
- However, if a potential employer chooses a specific time and location for its own weekly safety briefings that are not specifically required by law *and requires all workers to attend, that may be probative of control.* Similarly, it is not probative of control if *a potential employer requires workers to provide proof of insurance required by state law,* but if a potential employer mandates what insurance carrier workers must use, that may be probative of control.
- The Department reminds stakeholders that this is *merely one aspect of one factor of a multifactor test*.
- Even if compliance with specific safety, contractual, customer service, or quality control requirements is indicative of control in a specific case, this does not compel a particular conclusion that the control factor favors employee status or that the overall analysis requires a particular result. [1]
- Thus, the final rule does not preclude *a finding that a worker is an independent contractor where an employer obligates workers,* for example, to comply with its own safety standards or quality control measures, after also considering other relevant factors in the economic reality analysis.

1. (372) For example, a court can consider control exerted over workers to comply with safety obligations as not indicative of control and nevertheless conclude upon consideration of all of the factors that such workers were employees under the FLSA. **See Rick's Cabaret, 967 F. Supp. 2d at 916, 922.**

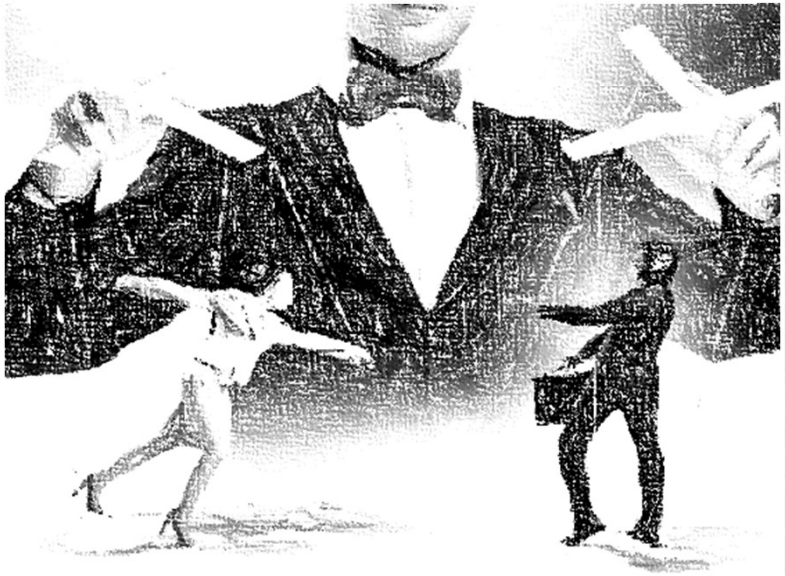
What could determine employer control over an individual?

1. Control over worker's schedule.

2. ***Actions taken by the potential employer that go beyond compliance with a specific, applicable Federal, State, Tribal, or local law or regulation and instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards***

3. xx

4. xx



What will the next sections of this factor address?

- With these general principles in mind, *the next sections address the Department's proposals* regarding *several aspects of control to be considered in determining whether the nature and degree of control* indicates that the worker is an employee or an independent contractor.
- This discussion is intended to be an aid in assessing common aspects of control—*including scheduling, supervision, price setting, and ability to work for others*—but should not be considered an exhaustive list, given the various ways in which an employer may control a worker or the economic aspects of the work relationship.
- Additional changes to the final regulatory text *in response to comments are also discussed throughout these sections.*

Scheduling

How the employer setting up the worker's schedule impacts an individual?

- As a consideration under the control factor, the Department proposed that *"[f]acts relevant to the employer's control over the worker include whether the employer sets the worker's schedule[.]"*
- While the 2021 IC Rule similarly recognized that a potential employer's control over *"key aspects of the performance of the work, such as by controlling the individual's schedule"* is relevant to determining employee or independent contractor status, the 2021 IC Rule also suggested that the worker's *"substantial control over key aspects of the performance of the work"* may be demonstrated simply by "by setting his or her own schedule." [86 FR 1246–47 (§ 795.105(d)(1)(i)).]
- As explained in the NPRM, after further consideration and review of the case law, the Department considered that *framing to be too narrow because it shifted focus away from the employer's control*— potentially allowing a finding of independent contractor status under the control factor based solely on a worker setting their own schedule, irrespective of other relevant considerations under control—and did not encompass actions the employer may take that would limit the significance of the worker's ability to set their own schedule.
- The Department recognizes that many independent contractor relationships include the worker's ability to start and end work as they see fit. [1]

1. (375) See, e.g., **Franze, 826 F. App'x at 77** (noting that schedule flexibility "weigh[s] in favor of independent contractor status"); **Karlson, 860 F.3d at 1094–96** (affirming a jury verdict finding a process server to be an independent contractor, in part, because the worker "was not required to report for work[,] . . . did not punch a time clock," and did not have a set schedule, report a daily schedule to the employer, or face discipline for not working); **Express Sixty-Minutes, 161 F.3d at 303** (determining that the employer "had minimal control" over the delivery drivers in part because the drivers "set their own hours and days of work" and could reject deliveries "without retaliation," which was evidence that the worker was an independent contractor).

How the employer setting up the worker's schedule impacts an individual? [Cont.]

- And the Department noted that such scheduling *freedom may be probative of a worker's independent contractor status.*[1]
- Yet, multiple courts of appeals have determined that *workers were employees*, rather than independent contractors, even when they had the flexibility to choose their work schedule.[2]
- Further, the Department noted that employers may still be able to *limit the number of hours available for a worker to choose or arrange the sequence or pace of the work in such a way* that it would not be possible for the worker to have a truly flexible schedule, thus exhibiting control that could indicate that a worker is an employee.[3]

1. **(376) 87 FR 62249 (citing Saleem, 854 F.3d at 146** (finding drivers who were able to set schedules that "were entirely of their making" were properly found to be independent contractors where, among other factors, drivers could select routes, there was no incentive structure for them to drive at certain times, and they could exercise business-like initiative)).
2. (377) See, e.g., **Verma, 937 F.3d at 230, 232** (finding the ability to set hours, select shifts, stay beyond a shift, and accept or reject work to be "narrow choices" when evaluated against other types of control exerted by the employer and that a "holistic assessment" of all factors showed that the workers were not, "as a matter of economic reality, operating independent businesses for themselves"); **Paragon, 884 F.3d at 1235–38** (finding that even though a worker could set his own schedule, he was an employee, in part, because his flat rate of pay did not allow him profit based on his performance); **DialAmerica, 757 F.2d at 1384–86** (finding telephone survey workers who set their own hours and were free from supervision to be employees); **Sureway, 656 F.2d at 1370–71** ("circumstances of the whole activity" show that laundry company "exercises control over the meaningful aspects of the cleaning [work]" despite the fact that workers could set their own hours).
3. **(378) 87 FR 62248 (citing Flint Eng'g, 137 F.3d at 1441** ("The record indicates rig welders cannot perform their work on their own schedule; rather, pipeline work has assembly line qualities in that it requires orderly and sequential coordination of various crafts and workers to construct a pipeline."); **Doty v. Elias, 733 F.2d 720, 723 (10th Cir. 1984)** ("Since plaintiffs could wait tables only during the restaurant's business hours, [the employer] essentially established plaintiffs' work schedules.")).

How the employer setting up the worker's schedule impacts an individual? [Cont.]

- As the Department noted, courts have often found that a worker's ability to set their own schedule, by itself, provides only minimal evidence that a worker is an independent contractor, particularly when the hiring entity exerts other types of control; therefore, *the freedom to set one's schedule should be evaluated against other forms of control implemented by an employer*. [1]
- The Department also cited the Tenth Circuit's common-sense observation that *"flexibility in work schedules is common to many businesses and is not significant in and of itself."* [2]
- For example, in Silk, the "unloaders" who came to the coal yard "when and as they please[d]" were employees rather than independent contractors. [(381) 331 U.S. at 706, 718.]
- Flexibility that allows workers to use time between tasks or jobs may also be an inherent component of some business models, but such flexibility does not preclude a finding that the employer has sufficient control over a worker in other ways to weigh in favor of employee status.

1. (379) See, e.g., **Verma, 937 F.3d at 230** (the Third Circuit found the ability to set hours, select shifts, stay beyond a shift, and accept or reject work to be "narrow choices" when evaluated against other types of control by the employer, such as setting the price for services); **Hill v. Cobb, No. 3:13–CV–045– SA–SAA, 2014 WL 3810226, at *4–5 (N.D. Miss. Aug. 1, 2014)** (finding that even though workers had no specific hours or schedule and could "come and go as [they] pleased" the employer "maintained extensive control over the remaining aspects" of the business such that the control factor weighed in favor of employee status); **Wilson v. Guardian Angel Nursing, Inc., No. 3:07–0069, 2008 WL 2944661, at *15–16 (M.D. Tenn. July 31, 2008)** (finding that although nurses could accept or reject shifts the employer exercised substantial control in other respects, such as over the manner in which nurses conducted their duties).
2. **(380) 87 FR 62249** (citing Snell, 875 F.2d at 806) (emphasis added); see **also Circle C. Invs., 998 F.2d at 327** (finding that the employer had "significant control" over dancers indicating employee status even though they had "input . . . as to the days that they wish to work"); **Doty, 733 F.2d at 723** ("A relatively flexible work schedule alone, however, does not make an individual an independent contractor rather than an employee."); **Walling v. Twyeffort, Inc., 158 F.2d 944, 947 (2d Cir. 1946)** (holding that workers who "are at liberty to work or not as they choose" were employees under FLSA).

How the employer setting up the worker's schedule impacts an individual? [Cont.]

- For instance, the Department noted that *"the power to decline work, and thus maintain a flexible schedule,* is not alone persuasive evidence of independent contractor status when *the employer can discipline a worker for doing so*." [1] Moreover, both employees and independent contractors may *possess scheduling flexibility in their working relationships.*
- As the discussion in the NPRM concluded, *control over a worker's schedule* exhibits just that: *one form* of control. [2]
- Both employees and independent contractors can take advantage of *flexible work arrangements*, which is why such scheduling flexibility, on its own, may not clearly indicate that the employer lacks control over the worker.[3]
- As the Department noted, this approach is consistent with *the economic realities, totality-of-the-circumstances approach*, where such scheduling flexibility should be weighed along with other aspects of control the employer may be implementing.

1. **(382) 87 FR 62249**; see, e.g., **Off Duty Police, 915 F.3d at 1060–62** (noting that "[a]lthough workers could accept or reject assignments, multiple workers testified that [the employer] would discipline them if they declined a job," which supported a finding that the control factor favored employee status for one set of workers; testimony that another set of workers may not have been punished for declining work did not clearly support either employee or independent contractor status under the control factor '); see also **Parrish, 917 F.3d at 382** (ability to turn down projects without negative repercussion was among the reasons the control factor weighed in favor of independent contractor status).
2. (383) See, e.g., **Mr. W Fireworks, 814 F.2d at 1048** (noting that work schedules compelled by the employer were, among other considerations within control, evidence that, "[a]s a matter of economic reality" the employer "exercise[d] great control" over the workers and thus, ultimately employee status).
3. (384) See **87 FR 62249 (citing Collinge, 2015 WL 1299369, at *4** (finding that the fact that on-demand "[d]rivers are free to wait at home for their first delivery of the day, and . . . are free to 'kill time' on a computer or run personal errands" in between jobs did not demonstrate lack of control "because [it] merely show[s] that [the employer] is unable to control its drivers when they are not working, an irrelevant point.") (footnotes omitted)).

Which commenters expressed support for scheduling flexibility?

Several commenters expressed general support for the NPRM's discussion of scheduling flexibility.

"[t]he NPRM . . . correctly makes clear that . . . 'scheduling flexibility is not necessarily indicative of independent contractor status where other aspects of control are present[.]' "

AFL-CIO

"supported the NPRM's discussion of scheduling flexibility, commenting that the economic reality inquiry "is not illuminated by whether a worker can choose to perform their work at nights instead of days (or vice versa), in short several-hour increments over a single day or several days, or in periods that vary seasonally." It contended that workers classified as employees have historically included workers with great scheduling flexibility across various industries, indicating that such freedoms are not synonymous with being an independent contractor.

PowerSwitch Action

"In their comments, ACRE et al. and the Washington Center for Equitable Growth agreed that flexible work schedules can be common to employees and independent contractors alike and ACRE et al. noted that "flexible schedules alone do not determine a worker's employment status."

ACRE et al. and the Washington Center

See also NPWF

"agreed, noting that scheduling flexibility, alone, is a "poor indicator[ ] of the economic realities of the contemporary working relationship" unless that fact can "actually demonstrate the worker's economic independence."

LA Fed & Teamsters Locals

"noted that "[t]he Department's guidance here is consistent with court decisions finding, for instance, that nurses, dancers, and delivery drivers . . . were employees even though they had substantial control over their work hours, because their employers retained control over prices for their services and/or other important elements of their jobs."

NWLC

What concerns commenters had about industry specific practices?

Some commenters addressed industry specific practices.

"noted that their members, who are restaurant workers, "frequently decide when and how long to work," yet, "once working, they have very little control over how they actually do the work," suggesting their economic dependence.

ROC United

"commented that, in their experience working with drivers, app-based companies "threaten to expel workers from the platform or reduce the availability of work shifts, unless the worker continuously accepts jobs;" a situation that limits the benefit of flexibility."

UFCW

"[applauded] "the Department's decision to broaden its framing of the scheduling element from the 2021 Rule and to focus on whether apparent scheduling flexibility actually provides for economic independence or whether the worker is still functionally dependent." It noted that truckers can be constrained by other forms of control—such as retaliation for declining too many offered loads—and stated the proposal's "emphasis on whether apparent scheduling flexibility is constrained by economic reality is accordingly well considered."

The law firm Nichols Kaster

"noted that, in their experience, "employers who misclassify their workers as independent contractors rely on the workers' ability to decline work as evidence of lack of control. But there is oftentimes no meaningful choice because declining work can result in discipline or other consequences." It suggested including language from the preamble in the final rule to emphasize this point.

"agreed with the Department's discussion of scheduling flexibility and similarly suggested that the Department include more information about scheduling flexibility in the final rule.

NELA

"noted that the term "scheduling flexibility" needs further refinement, since workers in the healthcare industry may have the flexibility to select their preferred shift from a job board but do not have the flexibility to decide when the shift starts and ends, and this "inherently less 'flexibility' " would indicate employee status.

Gale Healthcare Solutions

REAL WOMEN IN TRUCKING

The Department declines commenters' suggestions to include additional content in the final regulatory text for this factor. The current proposal was intended to provide succinct statements regarding each factor of the economic reality test with the understanding that the preamble will be accessible for additional information regarding the rule, as will future sub-regulatory guidance.

Which commenters expressed concerns about the scheduling flexibility?

Several commenters also expressed concern with the Department's approach, asserting that scheduling flexibility is a strong indicator of independent contractor status.

"a worker's ability to autonomously determine their own work schedule (days, hours, time of day, and more) is a strong predictor of independent status—on Uber, drivers and couriers can start and stop work whenever and wherever they choose, accepting only those offers they want to take[.]"

UBER

asserted that "[n]ot only is scheduling flexibility a significant distinction between employment and independent work: it gets to the very heart of the economic reality test."

DoorDash

See also National Propane Gas Association

"suggested that the Department's treatment of scheduling flexibility is misguided because, for example, "contract work may provide [low-wage earners] with control over their schedules, providing the ability to maximize their earnings and better attend to their personal obligations."

SHRM

Multiple individuals, like one "independent healthcare professional," stressed that many people like them want "the freedom to engage in flexible work arrangements that best meet our needs."

- The Department recognizes that many workers need and desire flexibility in their work schedules and seek out job opportunities that provide that flexibility.
- And, in some cases, control over one's schedule can be probative of an employer's lack of control over a worker, indicating that they may be an independent contractor.

1. (386) See, e.g., **Express Sixty-Minutes, 161 F.3d at 303** (determining that the employer "had minimal control" over the delivery drivers in part because the drivers "set their own hours and days of work" and could reject deliveries "without retaliation," which was evidence that the worker was an independent contractor)

How has case law addressed scheduling flexibility?

- However, case law has consistently held that scheduling flexibility may be a relatively minor freedom, especially in those cases where a worker is prevented from exercising true flexibility because of the pace or timing of work or because the employer maintains other forms of control, such as the ability to punish workers who may seek to exercise flexibility on the job. [1]
- In this way, the 2021 IC Rule's focus on scheduling flexibility as a fact that demonstrates "substantial control over key aspects of the performance of the work" misapplied relevant cases that suggest the opposite conclusion. [2]
- The proper lens for the test is the totality-of-the-circumstances analysis, which considers scheduling flexibility along with other forms of control the employer might exert, as well as with other factors in the economic reality test. [3]

1. (387) See, e.g., **Verma, 937 F.3d at 230** (ability to set hours, select shifts, stay beyond a shift, and accept or reject work were "narrow choices" when evaluated against other types of control by the employer, such as setting the price for services); **Off Duty Police, 915 F.3d at 1060** ("Although workers could accept or reject assignments, multiple workers testified that [the employer] would discipline them if they declined a job," which was evidence of the employer's ultimate control); **Flint Eng'g, 137 F.3d at 1441** ("The record indicates rig welders cannot perform their work on their own schedule; rather, pipeline work has assembly line qualities in that it requires orderly and sequential coordination of various crafts and workers to construct a pipeline.").
2. (388) 86 FR 1247–48.
3. (389) See, e.g., **Pilgrim Equip., 527 F.2d at 1312** ("In the total context of the relationship neither the workers'] right to hire employees nor the right to set hours indicates such lack of control by [the employer] as would show these operators are independent from it.") (emphasis added).'

What commenters asked the department to do?

Some commenters asserted that consideration of scheduling flexibility should take into account specific industry and/or contractual arrangements that limit its availability.

"commented that the Department's proposed approach "ignores key realities of business relationships common to retailers and restaurants." Examples include individuals who rent retail space but are constrained by limited operating hours of the building in which they rent, food delivery workers who may only be able to deliver food when a restaurant is open, or cleaning crews who can only do their work at night. They asserted that these types of limitations do not necessarily indicate that the worker lacks control over their schedule.

NRF & NCCR

"echoed this sentiment, noting that "[a] business engaging a contractor to perform services is likely to have certain dates or times that they would prefer or possibly need that work to be performed," suggesting the Department did not take this reality into account.

CA Chamber

"(asserting that the control analysis is complicated "by adding to it such items of routine contractual terms" like scheduling which "cast no meaningful light on employer-employee status."

AFPF

PGA

"specific to its industry, that "[golf] teaching professionals set their own schedules," yet "their ability to teach at a particular space may be limited by the space's operating hours or conflicting events that require the use of the property." They asserted that this limitation "should not be viewed as an example of a lack of control by the teaching professional."

"contended that if the Department's perspective is that limited scheduling control by the worker indicates employee status, then many drivers who independently "elect to transport similar loads along the same routes over a period of time, risk losing their status and independence under this factor." They asserted that drivers who wish to remain independent would thus have to "arbitrarily switch routes and carriers, and . . . bear whatever costs or inefficiencies such switches may give rise to, simply to preserve their independent status under this factor" and requested that the Department adopt "language which specifically incorporates consideration of the reality of the industry in question."

DART

What commenters asked the department to do? [Cont.]

"suggested that the type of flexibility its workers possess is fundamentally different from the flexibility an employee may obtain from an employer. For instance, "[h]aving some room to voice a preference about shifts or work remotely isn't true scheduling flexibility, because the ultimate control still belongs to their employers, who dictate things like deadlines and meeting schedules that can't be shirked." In contrast, DoorDash noted that its platform allows workers to work on their own time and walk away, potentially for weeks or months at a time.

DoorDash

- The Department disagrees that its formulation of the control factor must explicitly consider unique contractual or industry-specific scenarios that might affect scheduling flexibility.
- The language of the proposed rule noted that *"[f]acts relevant to the employer's control over the worker include whether the employer sets the worker's schedule,"* or where the employer *"places demands on workers" that do not allow them to work . . . when they choose."* [87 FR 62275]
- To the extent a potential employer is exerting control over when and for how long an individual can work, that fact is indicative of the employer's control.
- And even in those scenarios where the worker's schedule is constrained by contract or employer requirements, *such scheduling control is only one fact among many that could be considered under the control factor.*

Finally, some commenters asserted that the Department's shift in focus to the employer's control was misguided.

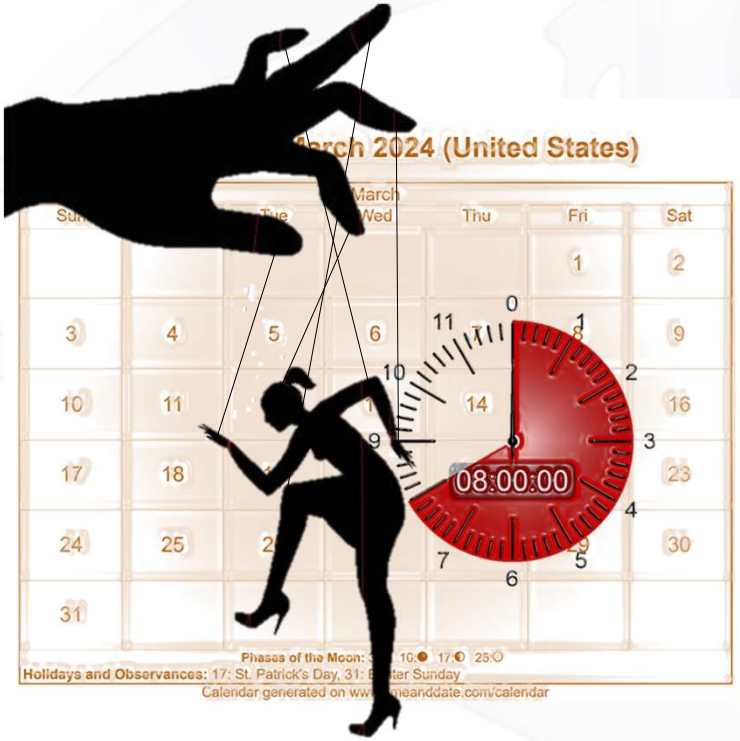
"where a result or service is perishable or deadline driven, based on the consumer's desire or the nature of the product or service, it is inappropriate to describe the final deadline as evidence of the business setting the worker's schedule." In this way, CWI argued, a focus on scheduling flexibility solely from the perspective of the employer, "prevents a counterbalancing of those separate actions by the employee that, separate and apart from its direct interactions with the putative employer, establish he is in business for himself."

CWI

N/ MA

"noted that a shift in focus "from the worker's right to control the manner and means by which the work is performed to the purported employer's control . . . [is] misdirected," and does not consider "the totality of the worker's business . . . including . . . whether the worker . . . determines to prioritize, stagger, or overlap projects from multiple entities" as they see fit.

Why is the department perspective based on employer's control?



- The Department's decision to present the control factor from the perspective of the employer's control over the economic aspects of the working relationship conforms *to relevant case law describing the factor and also represents a common-sense understanding that an employer's ability to control a worker's time may be probative of the worker's status.* [For discussion of this issue generally, see section V.C.4(a).]
- And as discussed earlier, where a worker has the ability to set their own work schedule, courts have often found this to be less significant relative to other ways in which the employer exerts control. As such, scheduling flexibility should not be considered potentially dispositive of the control factor as articulated in the 2021 IC Rule.
- Moreover, the rule does not eliminate the relevance of the worker's ability to control their schedule in the analysis, as the rule notes that "more indicia of control by the worker," such as control over one's schedule, may "favor[ ] independent contractor status."
- The Department is finalizing the scheduling portion of the control factor at § 795.105(b)(4) as proposed.

What could determine employer control over an individual?

1. Control over worker's schedule.

2. ***Actions taken by the potential employer that go beyond compliance with a specific, applicable Federal, State, Tribal, or local law or regulation and instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards***

3. xx

4. xx

What doesn't represent employer control over an individual?

1. An indefinite or continuous relationship is often consistent with an employment relationship.
2. xx
3. xx
4. xx

Supervision

What is the department proposing when it comes to "Supervision" within the control factor?

- With respect to the consideration of supervision within the control factor, the Department proposed *that "[f]acts relevant to the employer's control over the worker include whether the employer . . . supervises the performance of the work"* including "whether the employer uses technological means of supervision (such as by means of a device or electronically)" or *"reserves the right to supervise or discipline workers*. ***[(393) 87 FR 62275 (proposed § 795.110(b)(4))]***
- In describing its proposal, the Department noted *the common-sense observation that an employer's close supervision of a worker on the job may be evidence of the employer's control over the worker*, which is indicative of employee status.
- Conversely, as the Department noted, the lack of close supervision may be evidence that a worker is free from control and is in business for themself. ***[(394) Id. at 62249]***
- However, courts have found that traditional forms of in-person, continuous supervision *are not required to determine that this factor weighs in favor of employee status*. [1]
- A lack of supervision is not alone indicative of independent contractor status,[2] *such as when the employer's business or the nature of the work make direct supervision unnecessary.*

1. (395) See, e.g., **Driscoll, 603 F.2d at 756** (farmworkers could be employees of a strawberry farming company even where the potential employer exercised little direct supervision over them); **Twyeffort, 158 F.2d at 947** (rejecting an employer's contentions that its tailors are independent contractors because they are "free from supervision, are at liberty to work or not as they choose, and may work for other employers if they wish").
2. **(396) 87 FR 62249 n.393** (noting that the legislative history of the FLSA supports this point directly, since the definition of "employ" was explicitly intended to cover as employment relationships those relationships where the employer turned a blind eye to labor performed for its benefit) (citing **Antenor, 88 F.3d at 934**))

How have the courts address "supervision" when considering employment status?

- For example, in Off Duty Police, the Sixth Circuit determined that security officers were employees although they were "rarely if ever supervised" on the job, noting that "the actual exercise of control 'requires only such supervision as the nature of the work requires.' " [1]
- Moreover, "the level of supervision necessary in a given case is in part a function of the skills required to complete the work at issue." ***[(398) Id. at 1061.]***
- As the court noted, there was a limited need to supervise where officers in that case *"had far more experience and training than necessary to perform the work assigned."* ***[(399) Id. at 1062]***
- And in DialAmerica, the Third Circuit concluded that homeworkers were employees even though they were subject to little direct supervision (a fact typical of homeworkers generally).[2]
- As the Second Circuit stated, *"[a]n employer does not need to look over his workers' shoulders every day in order to exercise control."* [3]
- In the NPRM, the Department also explained that employers may rely on training and hiring systems that make direct supervision unnecessary. As the Department noted, in Keller v. Miri Microsystems LLC, an employer relied on *pre-hire certification programs and installation instructions* when hiring their satellite dish installers. ***[(402)781 F.3d at 814]***
- The court noted that the employer had little day-to-day control over the workers and did not supervise the performance of their work, but that a factfinder could "find that [the employer] controlled [the installer's] job performance through its initial training and hiring practices."

1. **(397) 915 F.3d at 1061–62** (quoting **Peno Trucking, Inc. v. Comm'r of Internal Revenue, 296 F. App'x 449, 456 (6th Cir. 2008)).**
2. **(400) 757 F.2d at 1383–84**. See also **McComb v. Homeworkers' Handicraft Coop., 176 F.2d 633, 636 (4th Cir. 1949)** ("It is true that there is no supervision of [homeworkers'] work; but it is so simple that it requires no supervision.").
3. **(401) Superior Care, 840 F.2d at 1060; cf. Antenor 88 F.3d at 933 n.10** (explaining in an FLSA joint employment case that "courts have found economic dependence under a multitude of circumstances where the alleged employer exercised little or no control or supervision over the putative employees").

How have the courts address "supervision" when considering employment status? [Cont.]

- The Department also highlighted, from the Fifth Circuit's statement in Parrish, that the *"lack of supervision [of the individual] over minor regular tasks cannot be bootstrapped into an appearance of real independence."* ***[(404) 917 F.3d at 381 (quoting Pilgrim Equip., 527 F.2d at 1312) (alteration in original))]***
- Yet, the Department recognizes that *a worker's ability to work without supervision may be probative of their independent contractor status*, such as in Nieman, *where the court affirmed a district court's conclusion that an insurance claims investigator was properly classified as an independent contractor*, in part, because the investigator worked largely without supervision when setting up appointments, and deciding where to work and how and when to complete his assignments. ***[(405) Nieman, 775 F. App'x at 624–25]***
- Finally, the Department noted that supervision can come in many different forms beyond physical *"over the shoulder"* supervision, which may not be immediately apparent. ***[(406) 87 FR 62250]***
- For instance, supervision can be maintained remotely through technology instead of, or in addition to, being performed in person, *such as when supervision is implemented via monitoring systems that can track a worker's location and productivity, and even generate automated reminders to check in with supervisors*. [1]

1. (407) Id. (citing, for example, **Ruiz v. Affinity Logistics Corp., 754 F.3d 1093, 1102–03 (9th Cir. 2014)** (finding in a state wage-and-hour case that techniques used by an employer to monitor its furniture delivery drivers were a form of supervision that made it more likely that the drivers were employees; as the court noted, the employer "closely monitored and supervised" the drivers by, among other things, "conducting 'follow-alongs'; requiring that drivers call their . . . supervisor after every two or three stops; monitoring the progress of each driver on the 'route monitoring screen'; and contacting drivers if . . . [they] were running late or off course"). See also **Scantland, 721 F.3d at 1314** (finding "meaningful supervision and monitoring" in part because the employer required cable installers to log in and out of a service on their cell phones to record when they arrived on a job, when they completed a job, and what their estimated time of arrival was for their next job).

Which commenters supported the discussion of supervision?

- Additionally, an employer can remotely supervise its workforce, for instance, by using electronic systems to verify attendance, manage tasks, or assess performance. [1]
- Thus, a totality-of-the-circumstances analysis properly includes not only exploring ways in which supervision is expressly exercised, *but also those instances where supervision is not apparent but still used by the employer*—either through the job's structure, training, or the use of technological tools.

1. (408) See id. (relying on the Department's enforcement experience in this area). For example, **an employer's use of electronic visitor verification ("EVV")** systems can be evidence of an employment relationship, especially in those instances where the employer uses the systems to set schedules, discipline staff, or run payroll systems, for example. See Domestic Service Final Rule Frequently Asked Questions (FAQs), U.S. Department of Labor (March

Several commenters supported the Department's discussion of supervision generally.

"noted that case law confirms the fact that, "direct, on-site supervision" is not a prerequisite to find that a worker is an employee.

LCCRUL & WLC

As LCCRUL & WLC noted, the Department's approach toward supervision allows a "more accurate and comprehensive determination of the economic reality of the parties' relationship."

"noted that the Department's description of supervision is helpful, since it highlights the many ways in which a worker might be controlled at work through direct management or technological surveillance.

ACRE et al., PowerSwitch Action and other commenters

"commended the Department's decision to address technologically mediated supervision, since, as NELP noted, "[m]any businesses today manage their workforces with monitoring systems that track productivity, location, and attendance." Providing this focus, NELP explained, "will ensure that supervision is analyzed regardless of the medium used to accomplish it."

NELP and ROC United

What did commenters asked the department to do in regard to supervision?

While some comments supported the overall approach to supervision in the NPRM, others suggested that the Department go further, either by adding additional context to the regulatory text or discussing additional facets of supervision.

"new technologies make[ ] it easier for employers to keep close tabs on workers and simultaneously disengage from modes of management that, in a pre-digital world, would likely have been indicators of an employment relationship." The use of such technology, they noted, may particularly effect low-wage workers whose jobs can be easier to measure, such as warehouse workers whose efficiency in moving material can be readily quantified, or delivery drivers, whose speed, routes, and drop-off points can be managed digitally. As they describe, in some industries, digital "surveillance has completely supplanted in-person supervision in cases where the nature of the work would otherwise require an onsite supervisor."

CLASP & GFI

"commented that the Department's approach is helpful since "supervision can take multiple forms" and employers have often argued that their workers are independent contractors by citing to the fact that they don't engage in in-person supervision of their work"

Nichols Kaster

"Nichols Kaster along with NELA, called on the Department to include more information from the preamble discussion in the final regulatory text, specifically language addressing supervision via automated systems and that the lack of apparent supervision would not necessarily be indicative of a worker's independent contractor status."

Nichols Kaster & NELA

"requested that the Department include language in the final regulatory text specifically clarifying "that a lack of direct supervision may still support a finding of an employer's right to control if an employer can simply exert control when it deems it in the employer's interest to do so."

NELP

"noted that the text of the final rule should also encompass the concept of "monitoring," since "many workers who work remotely . . . are primarily 'supervised' through digital monitoring."

Outten & Golden

What's the department response to the comments noted asking for more info on supervision?

- The Department declines to adopt the additional regulatory language suggested by commenters, as it believes additional discussion is more appropriate for future subregulatory guidance.
- In response to NELP, the Department understands its suggestion as requesting additional detail regarding reserved control, which is discussed elsewhere in this final rule.
- The Department also declines to add the phrase *"monitoring"* to the final regulatory text as requested by Outten & Golden.
- As described below, the Department agrees that supervision of a worker includes all forms of supervision which go to the worker's performance of the work.Thus, while the act of collecting data through monitoring systems could be used to supervise the performance of work, it might instead serve other operational needs of the employer not related to control. Therefore, adding "monitoring" to the regulatory text would not be helpful at highlighting this distinction.
- Moreover, to the extent Outten & Golden's comments were intended to include monitoring to capture situations where the employer would monitor a worker and then exert supervisory control when needed or desired, the Department is confident that this scenario is very similar to its discussion of reserved control where an employer possesses supervisory control but elects to exert it when it chooses. ***[(409) See section V(D)]***
- Where an employer reserves the right to use electronic or digital means of supervision—rather than traditional in-person supervision— to monitor a worker and thus correct or direct the performance of the work when it deems necessary, then this too would be relevant to the economic reality analysis. [1]
- Accordingly, the Department concludes that the regulatory language describing the control factor contains sufficient information to inform stakeholders about the scope of this factor.

1. (410) See generally Superior Care, 840 F.2d at 1060 (finding that the employer's reserved right to perform in-person supervision of nursing staff was relevant to the economic reality analysis).

What's the department take on Gale Healthcare Solutions suggestion?

"suggested that the Department include supervision provided by onsite or related entities such as scenarios where healthcare staff sent by an employer to a worksite receive "supervisory-like feedback" on their performance that can be communicated back to their employer. Moreover, Gale Healthcare was concerned that if the Department indicated in the final rule that initial training—which some employers have deployed in lieu of direct supervision— is indicative of control, and thus employee status, that employers who wish to continue engaging independent contractors may forego such training, which could harm individuals in the healthcare industry.

Gale Healthcare Solutions and IntelyCare

- The Department also recognizes the situation that Gale Healthcare Solutions and IntelyCare raise regarding supervision that may be performed by other entities where the work is performed and relayed back to a potential employer.
- However, the Department declines to add specific language addressing this scenario, since this scenario would require a fact specific inquiry.
- For example, if a potential employer is exercising control, but delegates it to a third party that is conducting onsite supervision and then reports that to the employer, then the same analysis regarding the employer's supervision would apply.
- Finally, to Gale Healthcare's concern regarding training, while it may be indicative of other factors in the economic reality test (e.g., skill and initiative), its relevance for the purposes of this portion of the control analysis is to simply highlight how training may be used by some employers to avoid any necessary supervision once the worker begins performing work. Such training that is not a replacement for close supervision, such as apprising workers of safety protocols, would not necessarily be indicative of supervisory-like control.

What's the departments' stance on tools used to supervise performance of work?

"commended the Department's focus on providing additional context to the control factor analysis, specifically the ways in which an employer might use technology to supervise its workforce."

UFCW

According to UFCW, since "employers in all industries are rapidly exploiting electronic surveillance to supervise workers," the final rule "should additionally explain that a company's use of nontransparent computer algorithms (programming codes) to manage workers is evidence indicative of employer control."

However, as discussed in the section on examples used in the preamble, UFCW, several of its locals, and the AFL–CIO would also have the Department go further by providing additional examples of ways in which employers use technology, including surveillance, data collection, and algorithmic management tools, to supervise workers.

- The Department agrees with commenters like the AFL–CIO that control over the performance of work that is exercised by means of data, surveillance, or algorithmic supervision is relevant to the control inquiry under the economic reality test.
- Such tools could be used directly by the employer or on their behalf to supervise the performance of the work.
- Digital tools are many times developed, controlled, and deployed to assist in (or independently conduct) supervision in ways that would have otherwise required in-person oversight.
- However, the Department believes that such tools, including algorithmic control, if used by the employer to supervise the performance of the work, are already captured by the regulatory text addressing a potential employer's use of "technological means of supervision (such as by means of a device or electronically)."
- Relatedly, the Department declines to add additional language suggesting actions like mere data collection would constitute supervision for the purposes of control.
- Like monitoring, an employer may collect data on business operations for purposes unrelated to its relationship to workers.
- Yet, the Department recognizes that where the employer collects information that then is used for the purposes of supervision and thus goes beyond information collection, that may be probative of an employer's control under this factor.

Which commenters disagreed with the departments approach to supervision?

Several commenters disagreed with the Department's approach regarding supervision.

"noted that a lack of supervision may in fact reflect that a worker is an independent contractor as independent contractors are often "retained precisely because they perform work that the putative employer does not," which results in less supervision. CWI further contended that a lack of supervision should edge toward a finding of independent contractor status in most cases."

CWI

This concern was echoed by N/MA

" which suggested that the Department's approach "turns the control factor upside down by effectively ignoring a lack of putative employer control."

N/MA

"Many independent contractors, N/MA contended, function without supervision precisely because of the specialized or technical services they render. N/MA asserted that "work that does not require supervision by the hiring entity is exactly the type of work that should be recognized as more likely to result in a determination of a lack of control over the manner and means by which the work is performed, and indicative of independence."

- The Department agrees with commenters that a lack of supervision may be probative of a worker's independent contractor status. That fact is reflected in case law as well as the Department's proposal. [1]
- For example, regarding N/MA's comment, the Department agrees that workers who deliver technical or specialized services may use that technical expertise to operate without supervision (either because the employer need not supervise a technically-proficient worker or the employer does not have the expertise themselves to meaningfully supervise).

1. (411) See, e.g., **Chao v. Mid-Atlantic Installation Servs., Inc., 16 F. App'x 104, 106–08 (4th Cir. 2001)** (agreeing with the district court's analysis that the ability to complete jobs in any order, conduct personal affairs, and work independently is evidence that leans toward identifying a worker as an independent contractor).

Which commenters disagreed with the departments approach to supervision? [Cont.]

Several commenters disagreed with the Department's approach regarding supervision.

- In such circumstances, an employer's lack of supervision may support a finding that the control factor weighs in favor of independent contractor status. The Department notes however, also consistent with case law, that the lack of supervision on its face should not halt a full analysis. [1]
- Lack of direct or in-person supervision may not indicate that the control factor weighs in favor of independent contractor status if there are other ways in which the employer is able to accomplish the same manner of control that would have otherwise been performed through close, in-person supervision over the performance of the work.
- As the Department indicated, for example, the employer may rely on detailed training or instructions, deploy electronic tools to direct the performance of the work remotely, or retain the right to conduct in-person supervision.

1. (412) See, e.g., **Superior Care, 840 F.2d at 1060** ("An employer does not need to look over his workers' shoulders every day in order to exercise control."); **Driscoll, 603 F.2d at 756** (farmworkers could be employees of a strawberry farming company even where the employer exercised little direct supervision over them); **Twyeffort, 158 F.2d at 947** (rejecting an employer's contention that its tailors are independent contractors because they are "free from supervision, are at liberty to work or not as they choose, and may work for other employers if they wish").

"suggested that the Department's proposal missed a critical distinction. By focusing merely on the fact that supervision may be maintained by technological means, they asserted that the proposal did not distinguish between supervision through technology that is "targeted toward the direction of the manner in and means by which the worker performs his work" and monitoring that is "targeted toward the particular goods or services at issue."

CWI

The comment noted, for example, that distributors of perishable goods like food and medicine use technological monitoring "to ensure product integrity, compliance with customer and regulatory commitments, and even the safety of the public at large," not necessarily to exercise control over the worker as an employee. The California and U.S. Chambers of Commerce and WPI agreed.

Which commenters disagreed with the departments approach to supervision? [Cont.]

"similarly contending that electronic monitoring "has little to no impact on economic realities, and that it is an often-commonplace component of normal arm's-length contracts."

WPI

See also Cambridge Investment Research, Raymond James, and

"similarly noted, technology is used to manage basic business functions and compliance monitoring, as well as "enhance[ ] the user experience for consumers" such as noting a driver's location, arrival time, or facilitating the exchange of money for the consumer."

FLEX **See also DSA; NHDA**

"Moreover, Flex noted that federal regulations require electronic monitoring for safety purposes in some industries, like trucking." [1]

See also; American Trucking Association; State Trucking Associations; U.S. Chamber.

Flex suggested that references to technology should be stricken from the rule.

See also DSA; PGA; Raymond James.

"stated, however, that technological supervision "coupled with some manner of corrective direction about the means and manner of performance may evidence employment," yet they commented that the Department's proposal "sweeps too broadly."

CWI

"noted that the language in the proposal could encompass the employer's or worker's use of everyday technologies that are used to run a contemporary workplace."

The Coalition of Business Stakeholders

"noted that independent contractors are also supervised, suggesting that it would be "nonsensical to assert that you would hire a contractor and never oversee their services or check in on progress."

CA CHAMBER

1. (414) For discussion of comments related to actions taken to comply with regulatory requirements see section V(C)(4)(a).

What is the departments response to the comments?

- The Department agrees with commenters such as CWI and WPI that *employers may at times use technology to track information critical to their business* or, as the CA Chamber notes, the mere status of work performed by a worker. Such actions can be performed consistent with an independent contractor relationship with a worker, even when the data being collected is generated from the actions of the worker.
- The Department thus agrees with CWI, for example, that the proposed regulatory text missed this nuanced distinction.
- However, as CWI noted, where such tracking is then paired with supervisory action on behalf of the employer such that the performance of the work is being monitored so it might then be directed or corrected, then this type of behavior may suggest that the worker is under the employer's control.
- Thus, the Department is adding additional language to the control factor to clarify that the relevant consideration is not simply the employer's use of technology to supervise, but the use of technology "to supervise the performance of the work."
- This is why the Department disagrees with Flex's call to eliminate any reference to technology and WPI's assertion that the use of technology never implicates the analysis under the economic reality test.
- Such a complete bar would suggest that a worker's performance of the work can never be controlled or directed by technology, which is not correct, especially when such tools are not only ubiquitous in many employment settings, but also are specifically deployed by some employers to supervise and direct the means through which a worker performs their job.

It added additional language to the control cycle clarifying that is not simply the employer's use of technology to supervise…

but the use of it TO SUPERVISE THE PERFORMANCE OF THE WORK.

What type of technology is the department referencing as probative to economic dependence?

TECHNOLOGY used specifically to SUPERVISE worker PERFORMANCE

- Moreover, the Department does not believe that the inclusion of a reference to technology, as noted by the Coalition of Business Stakeholders, would act as an unbounded factor, pulling in all forms of technology used in modern workplaces.
- The only forms of technology referenced by the rule are those that are deployed by the employer as a means of supervising the performance of the work which are thus probative of economic dependence, not all technologies that the employer might be using in their business.
- The Department notes that comments received regarding the proposal's discussion of an employer's reserved control over the worker, including reserved rights to supervise, are addressed in the discussion of reserved rights in section V.D.
- The Department is finalizing the supervision portion of the control factor at § 795.105(b)(4) with the revisions discussed herein.

What may be deemed supervision under this section?

An employer using technology <u>specifically to supervise the performance of a worker</u>.

- Whether that control over the performance of work is exercised by means of data, surveillance, or algorithmic supervision – it is deemed relevant to the inquiry.
- An employer can remotely supervise its workforce, for instance, by using electronic systems to verify attendance, manage tasks, or assess performance.

Question	Answer
Will the above be enough to properly deduct worker classification?	**No.** A totality-of-the-circumstances analysis properly includes not only exploring ways in which supervision is expressly exercised, *but also those instances where supervision is not apparent but still used by the employer*—either through the job's structure, training, or the use of technological tools.
Which type of technology apply to this factor?	The only forms of technology referenced by the rule are those that are deployed by the employer as a means of <u>supervising the performance of the work</u> which are thus probative of economic dependence, not all technologies that the employer might be using in their business.

Setting a Price or Rate for Goods or Services

What's the department stance on the control factor's treatment in setting price or rate for goods or services?

- Regarding the control factor's treatment of the ability to set a price or rate for goods or services, the Department proposed that this factor consider whether the "employer controls economic aspects of the working relationship . . . including control over prices or rates for services." ***[(415) 87 FR 62275 (proposed § 795.110(b)(4))]***
- As the Department noted, facts related to the employer's ability to set prices or rates of service relate directly to whether the worker is economically dependent on the employer for work and help answer the question whether the worker is in business for themself. ***[(416) 87 FR 62250]***
- At the outset, the Department noted that workers in business for themselves are generally able to set (or at least negotiate) their own prices for services rendered.
- The Department further noted that one of the early Supreme Court cases applying the economic reality test concluded that the workers were employees in part because they were not "selling their products on the market for whatever price they can command." ***[(418) Whitaker House, 366 U.S. at 32.]***
- The Court explained that, instead, the workers were "regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates."

Which case laws show that employer's command over price or rate equates to control over worker?

- The Department also cited multiple court of appeals and district court decisions finding that an employer's command over the price or rate for services indicated their control over the worker and that the worker was thus less likely to be in business for themself. [1]
- Conversely, the Department noted that when a worker negotiates or sets prices, those facts weigh in favor of independent contractor status. ***[(421) Id. at 62251]***

1. **(420) 87 FR 62250–51** (citing **Verma, 937 F.3d at 230** (identifying, among other things, the employer's setting the price and duration of private dances as indicative of "overwhelming control" over the performance of the work); **Off Duty Police, 915 F.3d at 1060** (concluding that certain security guards were employees, in part, because "[the employer] set the rate at which the workers were paid"); **McFeeley, 825 F.3d at 241–42** (affirming that a nightclub owner was exercising significant control because, among other things, it set the fees for private dances); **Cornerstone Am., 545 F.3d at 343– 44** (finding the control factor weighed in favor of employee status where employer controlled "meaningful" economic aspects of the work, including pricing of products sold); **Selker Bros., 949 F.2d at 1294** (finding that, among other things, the fact that the employer set the price of cash sales of gasoline reflected the employer's "pervasive control" over the workers); **Agerbrink v. Model Serv., LLC, 787 F. App'x 22, 25–26 (2d Cir. 2019)** (determining that there were material facts in dispute regarding the worker's "ability to negotiate her pay rate," which related to the degree of control exerted by the employer, and rejecting the employer's contention that the worker had control over her pay rate simply because she could either work for the amount offered or not work for that amount, stating that this "says nothing of the power to negotiate a rate of pay"); **Karnes v. Happy Trails RV Park, LLC, 361 F. Supp. 3d 921, 929 (W.D. Mo. 2019)** (finding park managers to be employees in part because the park owners "set all the prices"); **Hurst v. Youngelson, 354 F. Supp. 3d 1362, 1370 (N.D. Ga. 2019)** (finding relevant to the control analysis that the plaintiff was not free to set the prices she charged customers and had no ability to waive or alter cover charges for her customers).

Which case laws show that employer's command over price or rate equates to control over worker? [Cont.]

- For instance, in Eberline v. Media Net, LLC, the court found that a jury had sufficient evidence to conclude that a worker exerted control over meaningful aspects of his business in part due to "testimony that installers could negotiate prices for custom work directly with the customer and keep that money without consequence." 1
- The Department also noted that the price of goods and services may sometimes be included in contracts between a business and an independent contractor. ***[(423) 87 FR 62251]***
- The Department quoted McFeeley, where the court observed that a worker doesn't "automatically become[ ] an employee covered by the FLSA the moment a company exercises any control over him.
- After all, a company that engages an independent contractor seeks to exert some control, whether expressed orally or in writing, over the performance of the contractor's duties[.]" ***[(424) Id. n. 410 (quoting McFeeley, 825 F.3d at 242– 43)]***
- Yet, the Department cautioned that the presence of a contract does not obviate the need for a complete analysis regarding the control exerted by the employer, such as the worker's ability to negotiate and alter the terms of the contract.
- As the discussion in the NPRM concluded, it is evidence of employee status when an entity other than the worker sets a price or rate for the goods or services offered by the worker, or where the worker simply accepts a predetermined price or rate without meaningfully being able to negotiate it.

1. **(422) 636 F. App'x 225, 227 (5th Cir. 2016);** see also **Nelson v. Texas Sugars, Inc., 838 F. App'x 39, 42 (5th Cir. 2020)** (finding that because "the dancers set their own schedule, worked for other clubs, chose their costume and routine, decided where to perform (onstage or offstage), kept all the money that they earned, and even chose how much to charge customers for dances, a reasonable jury could conclude that the Club did not exercise significant control over them") (emphasis added).
2. (425) Id. (citing **Scantland, 721 F.3d at 1315** (reversing summary judgment for the employer based in part on evidence that the workers "could not bid for jobs or negotiate the prices for jobs")).

What were commenters input on adding price setting under the control factor?

Multiple commenters supported the Department's inclusion and description of price setting under the control factor.

"stated that this inclusion is a "recognition of the great significance of an employer's control over setting prices for services" which is "much more reliable indicia of entrepreneurial status than less significant aspects of control." Such an approach, it suggested, will prevent employers from "offering [workers] minor forms of control while effectively setting a ceiling on the workers' earnings by maintaining control over the rates offered to customers."

LA Fed & Teamsters Locals

"noted that the proposal "expounds on this important point and provides focus and clarity on what 'economic aspects' means."

Law Firm Nichols Kaster

commended the Department for providing "helpful clarity" regarding price setting generally, providing an example of a worker's ability to negotiate rates where drivers select jobs from a "free-market load board" where they can negotiate the rates for their services and sign a rate contract directly with brokers.

REAL Women in Trucking

"stated that the Department's discussion of price setting appropriately recognized that price-setting is a form of control, since an independent contractor "controls, and has the right to control, all important business decisions," including "what good or service to sell and at what price."

NELP

As NELP further noted, "without the power to set prices for goods or services, a worker will likely be economically dependent on an employer for work, and if she wants to increase earnings, her only option is to work longer, harder, or more jobs."

Some commenters suggested revisions to the proposed regulatory language.

"urged the Department to amend the discussion regarding control to include a discussion of information asymmetries, noting that where a company conceals pricing data, that would indicate that a worker is not an independent contractor, since the worker lacks key information regarding price that would affect entrepreneurial decisions they might make."

UFCW

What were commenters input on adding price setting under the control factor? [Cont.]

"similarly suggested that the Department "clarify in the rule that another factor in determining if workers are considered employees must include if a corporation exercises control over workers through pay structures," specifically bonus pay systems used by some transportation network companies that encourage workers to drive more. ACRE et al. also suggested that the Department clarify that price (or wage) setting is so critical to the analysis that "workers who can not independently set their own wage rates are, per se, not independent contractors."

ACRE et al.

See also Jobs With Justice; NELA; Outten & Golden; PowerSwitch Action.

- The Department agrees that the lack of information regarding prices may prevent a worker from negotiating prices to further their own business.
- The Department believes that this concept was captured in the proposed language that the Department is finalizing which states that "[w]hether the employer controls economic aspects of the working relationship" should be considered, including "control over prices or rates for services." ***[(415) 87 FR 62275 (proposed § 795.110(b)(4))]***
- Control over price is one specific example and is not meant to be exhaustive. Further, the Department believes that defining the relationship in terms of "information asymmetry" would be less helpful to businesses that are trying to understand their obligations, since that term is ambiguous.
- Moreover, the Department is confident that situations in which the employer is controlling specific payment terms or pay structures are captured by the proposed regulatory language because the relevant inquiry focuses on an employer's control of "economic aspects of the working relationship," which can embrace a nonexclusive set of considerations that may be relevant to a specific working relationship.
- Finally, the Department declines to adopt multiple commenters' suggestion to state that a worker's lack of control over prices would suggest conclusively that they are not independent contractors.

What were commenters input on adding price setting under the control factor? [Cont.]

- As mentioned throughout this final rule, the Department declines suggestions to predetermine the weight of certain considerations, facts, or individual factors.
- The Department notes, however, that in a particular case, after considering all the facts of a particular relationship, control over pricing may be highly relevant to whether the control factor weighs in favor of employee or independent contractor status.
- This approach is consistent with case law, where a court "adapt[s] its analysis to the particular working relationship, the particular workplace, and the particular industry in each FLSA case." ***[(427) McFeeley, 825 F.3d at 241]***

Some commenters were opposed to the inclusion of price setting or the extent to which it may be used to illuminate the control factor of the economic reality test.

"noted that while it "generally agree[s] with the description of this facet of the control factor," it was concerned that it may receive too much weight in the analysis because some employees, "such as salaried whitecollar workers" can negotiate their pay, while others, like an "hourly employee on an assembly line" may not. Therefore, the CA Chamber stated that considerations regarding price control, "should have limited use in the analysis because it is not a defining feature of employment generally."

CA Chamber

See also AFPF; Richard Reibstein, publisher of legal blog.

"shared that considerations regarding price are misplaced for the insurance industry, as "neither insurers nor insurance agents have unlimited discretion to adjust prices however they see fit." In fact, "[c]onsistent with the requirement of financial solvency, insurance agents and advisors have no say or influence over the price of the products that they sell on behalf of firms, and they are prohibited by law from 'rebating' any of the commissions earned from those sales," a fact that "effectively bars them from getting involved in, or setting, pricing."

IFA

"noted its concern with the Department's treatment of price as it related to franchising relationships. IFA explained, "[f]ranchisors commonly suggest resale prices for offerings across the franchise system and, subject to applicable law, may set minimum or maximum prices for products or services, or have uniform advertising requirements for system-wide promotions." IFA requested that the Department, "expressly state that, in the franchise context, the fact that a franchisor sets prices for goods or services is not probative of an employment relationship."

What were commenters input on adding price setting under the control factor? [Cont.]

"noted a similar arrangement among some investment advisors, who cannot fully negotiate rates for commissions because such rates are, in part, determined by the application of SEC regulations."

Alternative and Direct Investment Securities Association

"noted that real estate industry commission payments in California are required to be paid through a broker (with a written agreement on how the commission will be shared between broker and salesperson).

C.A.R.

"stated that cattle health processing crews, workers common in the cattle industry that care for herds, are similarly paid indirectly by a cattle farm that contracts for services of a company that engages crew members.

Coalition of Cattle Associations

"commented that considerations around prices or rates are superfluous because "[a] worker's ability to negotiate or otherwise impact the amounts that he earns for his work is already fully incorporated in the opportunity-forprofit-or-loss factor." Thus, CWI suggested that since this consideration should be withdrawn as it is redundant.

C.A.R.

"similarly noted that such overlapping analysis results in "improper[ ] double counting."

N/MA

See also CMAA. & NRA.

- The Department declines to adopt commenters' proposals to de-emphasize the relevance of control over prices or rates of service.
- Just as the Department declined the suggestion that it elevate the role of control over prices, the Department concludes that giving this consideration less weight would similarly undermine a totality-of-the-circumstances analysis.
- An employer's control over pricing should be one fact among all other facts considered under the control factor as it may be probative of a worker's economic dependence on a potential employer.

Does the department recognize that many sectors set prices and rates for goods or services?

YES! And that's why the final regulatory text of this factor has been updated as follows:

"Actions taken by the potential employer for the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation are not indicative of control."

However, beyond those obligations, price control by the employer shows that the worker is less likely to be in business for themselves.

- The Department recognizes that many industries, occupations, or even business sectors set prices and rates for goods or services in ways that are unique, as noted by commenters like ACLI and IFA.
- However, workers who are truly in business for themselves will generally control the fundamental economic components of their business, including the prices to charge customers or clients for the goods or services offered.
- As discussed in section V.C.4.a, the Department is revising the final regulatory text of this factor to state: "Actions taken by the potential employer for the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation are not indicative of control."
- However, beyond those obligations, where the potential employer exerts control to set rates or prices for services, the worker is more likely to be "receiving the compensation the organization dictates," and thus less likely to be in business for themself***. [(428) Whitaker House, 366 U.S. at 32]***
- In addition, the Department disagrees with commenters such as CWI and N/ MA contending that the discussion of price in both the nature and degree of control and opportunity for profit and loss factors is not warranted.
- In the former, the analysis is focused on the employer's actions that would control the economic aspects of the working relationship, while the discussion of the latter focuses on ways in which the individual has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker's economic success or failure in performing the work.
- Each discusses prices from different analytical points of view, an effort that is consistent with this final rule's approach, which is to analyze the working relationship in all its facets.

Will the department omit the discussion of price under control factor?

NO! The department believes that a potential employer's general control over the prices or rates for services is indicative of employee status; however, this fact alone DOES NOT delineate the FINAL Worker Classification Outcome.

- Finally, the Department declines commenter suggestions to omit any discussion of price setting under the control factor.
- The Department continues to believe, consistent with case law, that a potential employer's general control over the prices or rates for services—paid to the workers or set by the employer—is indicative of employee status.
- When an entity other than the worker sets a price or rate for the goods or services offered by the worker, or where the worker simply accepts a predetermined price or rate without meaningfully being able to negotiate it, this is relevant under the control factor.
- As such, the Department declines to create a carve-out for certain business models or industries, as requested by some commenters, although the Department emphasizes that this position is intended to be consistent with the case law on this issue and is not creating a novel interpretation.
- Importantly, however, as with all considerations discussed under all the factors, the Department does not intend for this fact to presuppose the outcome of employment classification decisions in any particular industry, occupation, or profession.
- The Department is finalizing the price setting portion of the control factor at § 795.105(b)(4) as proposed.

What impacts worker classification as an Independent Consultant under this factor?

Lack of Control over Rate/ Price Range for Services Provided

Accepting Employer Set Value/Price without negotiation

Question	Answer
What happens when the employer have control over the price for services rendered?	Under this factor, when the employer has control over the prices or rate of the consultant, then the employer has the upper hand, and this factor will flip to "Employee". This is consistent with case law. [Unless exempted by the 3rd question below.]
Will this control dictate the overall worker classification?	No. The Department does not intend for this fact to presuppose the outcome of employment classification decisions in any particular industry, occupation, or profession. The department will not be suggesting a predetermine the weight of certain considerations, facts, or individual factors – as each case is unique in nature.
What happens if the price/ rate is pre-determined?	The Department understand that some industries have set prices based on compliance or regulation requirements. In that case, the department added that 'Actions taken by the potential employer for the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation are not indicative of control.''

Ability to Work for Others

What is the departments take on an employer that limits the worker's ability to work for others?

- Another consideration that the Department proposed under the control factor was whether the employer "explicitly limits the worker's ability to work for others" or "places demands on workers' time that do not allow them to work for others." ***[(429) 87 FR 62275 (proposed § 795.110(b)(4))]***
- This consideration was consistent with the 2021 IC rule, which also recognized that directly or indirectly requiring an individual to work exclusively for an employer was indicative of an employer-employee relationship. ***[(430) See 86 FR 1247 (§ 795.105(d)(1)(i))].***
- As explained in the NPRM, where an employer exercises control over a worker's ability to work for others, this is indicative of the type of control over economic aspects of the work that is associated with an employment relationship rather than an independent contractor relationship. ***[(431) 87 FR 62251–52]***
- Control over a worker's ability to work for others may be exercised by directly prohibiting other work—for example, through a contractual provision. [1]

1. (432) See **Parrish, 917 F.3d at 382** (noting that the non-disclosure agreement did not require exclusive employment, and was therefore not an element of control that indicated employee status); Off Duty Police, 915 F.3d at 1060–61 (non-compete clause preventing workers from working for employer's customers for two years after leaving employment was among evidence supporting finding that control factor indicated employee status); **Express SixtyMinutes, 161 F.3d at 303** ("Independent Contractor Agreement" did not contain a "covenant-not-tocompete" and drivers could work for other courier delivery providers, which indicated independent contractor status); see also **WHD Op. Ltr., 2000 WL 34444342, at *1, 4 (Dec. 7, 2000)** (workers were required to sign an agreement that prohibited them from working for other companies while driving for the employer, which suggested employee status); but cf. **Faludi v. U.S. Shale Sols., LLC, 950 F.3d 269, 276–77 (5th Cir. 2020)** (a non-compete clause "does not automatically negate independent contractor status"); **Franze, 826 F. App'x at 76–77** (although a non-compete provision prohibited drivers from driving routes and carrying products for competing companies, facts showed that the drivers "controlled the overall scope of their delivery operations" because of their control over distribution territories, ability to hire others, schedule flexibility, and lack of oversight)

What employers do and how the courts have addressed the demand imposed by employers?

- It may also be exercised indirectly by, for example, making demands on workers' time such that they are not able to work for other employers,[1] or by imposing other restrictions that make it not feasible for a worker to work for others. [2]
- For example, in Scantland, the Eleventh Circuit determined that cable technicians could not work for other companies, either because they were told they could not do so or because the workers essentially had an exclusive work relationship with the employer because they were required to work 5 to 7 days a week and could not decline work without risking termination or being refused subsequent work. ***[(435) 721 F.3d at 1313–15]***
- Thus, the employer controlled whether they could work for others, which suggested that they were economically dependent on the employer. ***[(436) Id. at 1315]***

1. (433) See, e.g., **Keller, 781 F.3d at 813–14** (although worker was not prohibited from working for other companies, "a reasonable jury could find that the way that [the employer] scheduled [the worker's] installation appointments made it impossible for [the worker] to provide installation services for other companies"); **Scantland, 721 F.3d at 1313–15** (finding even if workers were not prohibited from working for other installation contractors their long hours and inability to turn down work suggested that the employer controlled whether they could work for others, which was in part why the control factor favored employee status); **Cromwell, 348 F. App'x at 61** ("Although it does not appear that [the workers] were actually prohibited from taking other jobs while working for [the employers], as a practical matter the work schedule established by [the employers] precluded significant extra work."); **Flint Eng'g, 137 F.3d at 1441** (finding the hours the company required of the workers, coupled with driving time between home and remote work sites every day, made it "practically impossible for them to offer services to other employers").
2. (434) See **Brant, 43 F.4th at 669–70** (despite having the contractual ability to haul freight for other carriers, a driver alleged that the company maintained a "system for approving and monitoring trips made for other carriers" that was "so complex and onerous that Drivers could not, as a practical matter, carry loads for anyone other than" the company, which the court determined weighed in favor of employee status).

What has been the courts stance on control exercised over the worker by an employer?

- The NPRM also recognized that some courts find that less control is exercised by a potential employer where the worker is not prohibited from working for others, particularly competitors, and that this may be indicative of an independent contractor relationship. [1]
- However, the Department declined to include in the regulatory text for the control factor a blanket statement that the ability to work for others is a form of control exercised by the worker that indicates independent contractor status.
- The Department was concerned that this framing, which was in the 2021 IC Rule, fails to distinguish between work relationships where a worker has multiple jobs in which they are economically dependent on each potential employer and do not exercise the control associated with being in business for oneself, and relationships where the worker has sought out multiple clients in furtherance of their business. ***[(438) 87 FR 62252]***
- As the Department noted, if one worker holds multiple lower-paying jobs for which they are dependent on each employer for work in order to earn a living, and a different worker provides services to multiple clients due to their business acumen and entrepreneurial skills, there are qualitative and legally significant differences in how these two scenarios should be evaluated under the economic reality test.

1. (437) See, e.g., **Razak, 951 F.3d at 145–46** (discussing disputed facts regarding whether drivers could drive for other services—Uber contended drivers could drive for other services but drivers contended that they could not accept rides from other platforms while online for Uber; drivers also noted that Uber's Driver Deactivation Policy stated that soliciting rides outside the Uber system leads to deactivation and that activities conducted outside the Uber system, like "anonymous pickups," were prohibited); **Paragon, 884 F.3d at 1235** (finding control factor favored independent contractor status in part because worker could and did work for other employers); **Saleem, 854 F.3d at 141–43** (drivers' ability to work for business rivals and transport personal clients showed less control by and economic dependence on the employer); **Express Sixty-Minutes, 161 F.3d at 303** (control factor "point[ed] toward independent contractor status" in part because the "Independent Contractor Agreement" did not contain a covenant-not-to-compete and drivers could work for other courier delivery providers).

What reflects a worker's freedom?

- Ultimately, as stated in the NPRM, the question is "whether a [worker's] freedom to work when she wants and for whomever she wants reflects economic independence, or whether those freedoms merely mask the economic reality of dependence.' [1]
- Dating back to Silk, the "unloaders" who came to the coal yard "when and as they please[d] . . . work[ing] when they wish and work[ing] for others at will" were deemed to be employees rather than independent contractors. ***[(440) 331 U.S. at 706, 718]***
- And as the Fifth Circuit has explained, "[the] purposes [of the FLSA] are not defeated merely because essentially fungible piece workers work from time to time for neighboring competitors." ***[(443)Seafood, Inc., 867 F.2d at 877]***

Being FREE TO WORK for WHOMEVER they want when they want!

1. (439) Reich v. Priba Corp., 890 F. Supp. 586, 592 (N.D. Tex. 1995) (citing Mednick, 508 F.2d at 300, 301–02).]

What courts have determined about workers?

- For example, in Seafood, Inc., the Fifth Circuit examined whether piece-rate workers who peeled and picked crabmeat and crawfish for a seafood processor, and who were allowed "to come and go as they please . . . and even to work for competitors on a regular basis" were, as a matter of economic reality, dependent on their employers and therefore employees under the Act. ***[(442) 861 F.2d at 451–53]***
- The court determined that the workers' ability to work for others was not dispositive, and that "[l]aborers who work for two different employers on alternate days are no less economically dependent on their employers than laborers who work for a single employer" because "that freedom is hardly the same as true economic independence***." [(443) Seafood, Inc., 867 F.2d at 877]***
- The Sixth Circuit has further observed that "[m]any workers in the modern economy, including employees and independent contractors alike, must routinely seek out more than one source of income to make ends meet." ***[(444) Off Duty Police, 915 F.3d at 1058]***

What input commenters had about including the ability to work for others within the control factor?

Several commenters supported the way the Department's proposal framed consideration of the ability to work for others within the control factor, including both direct and indirect means of limiting individuals' ability to work for others. See, e.g., LA Fed & Teamsters Locals; NWLC; Real Women in Trucking; UFCW.

"contended that the 2021 IC Rule "misapplies the law" by stating that workers could be found to exercise "substantial control" by having the ability to work for others, because "[f]or decades, employees have been able to have multiple jobs . . . without losing the protections the law bestows on employees." The LA Fed supported the Department's proposal, explaining that it "rightly recognizes that workers' ability to . . . work for others does not support independent contractor status unless . . . facts actually demonstrate the worker's economic independence."

LA Fed

"stated that the 2021 IC Rule "impermissibly narrow[ed] the concept of control itself by focusing on control over work exercised by the individual worker, as opposed to the right to control by an employer" and by using as an example a worker's "substantial control" through the ability to work for others despite many decisions finding workers to be employees even though they worked for others."

NWLC

Some commenters requested that the Department provide a description of this aspect of the control factor that would address the workers' ability to work for others, not just the employer's actions, and state that where an individual has the ability to work for others, including competitors, this weighs in favor of independent contractor status. See, e.g., CPIE; DoorDash; N/MA.

"commented that the proposed rule "adopts a one-sided approach: if a hiring entity limits a worker's ability to work for others, that counts toward employee status, but if a worker has the freedom to work for others, that doesn't count toward independent contractor status."

DoorDash

"observed that employer limitations on the ability to work for others cannot be viewed simply as the converse of a worker's ability to work for others: "The fact that an employer entity does not prohibit outside work does not suggest independent contractor status because having multiple jobs is compatible with an employment relationship. However, being prohibited from working for others clearly indicates the control of an employer, rather than an independent contractor relationship."

Outten & Golden

What input commenters had about including the ability to work for others within the control factor? [Cont.]

"contended that the "employer-centric focus" of the proposed regulatory text addressing a worker's ability to work for others was "misguided" because, as the Department noted in the NPRM, there is appellate authority acknowledging "a worker's ability to work for others—and thus develop multiple sources of business—as evidence of independent contractor status." CWI did not feel it was sufficient to address this factor by stating that a business placing a limitation on the ability to work for others was evidence of employee status because this failed to take into account "the fact that a worker may be simultaneously (and in a multi-app situation, potentially at the exact same time) working for others." Moreover, referencing Saleem, CWI contended that the fact that a worker could earn income through work for others meant that the worker was "less economically dependent on his putative employer."

CWI

- The Department notes that the mere fact that a worker earns income from more than one employer does not mean that the worker is not economically dependent on one or all of those employers, as a matter of economic reality.
- Economic dependence is based on an analysis of the multifactor economic reality test, not whether a worker is less financially dependent on the income they earn from any one employer. [See supra, section V.B.]
- As discussed under this factor and the permanence factor (section V.C.3), it is well established that having multiple jobs is not inconsistent with employee status under the FLSA, and in fact, workers are often required to take on more than one job just to make ends meet.
- Moreover, in Saleem, the case referenced in CWI's comment, the Second Circuit recognized that: "a company relinquishes control over its workers when it permits them to work for its competitors." [Saleem, 854 F.3d at 141]
- This case supports the importance of looking to whether a potential employer restricts a worker's ability to work for others.

What input commenters had about including the ability to work for others within the control factor? [Cont.]

"argued that the focus should be on the worker's right to control and not the employer's control, because "a freelancer may perform multiple projects among multiple separate (and sometimes competing) entities," and N/MA felt that the right to control factor should consider "the totality of the worker's business . . . including control over whether the worker subcontracts any part of the work necessary to complete a project, whether and how the worker may advertise their services, and whether the worker determines to prioritize, stagger, or overlap projects from multiple entities."

N/MA

- The Department views N/ MA's comment to be advocating for a totality-of-the-circumstances test that is congruent with the economic reality test, including consideration not just of control, but also factors like opportunity for profit or loss, investment, and use of specialized skills in connection with business-like initiative.
- Whether a potential employer restricts a worker's ability to work for others would certainly not be the only consideration under control, nor would it preclude consideration of the other factors listed in N/MA's comment.
- Further, the Department notes that even within the control factor, the regulatory text acknowledges that "more indicia of control by the worker favors independent contractor status." [29 CFR 795.110(b)(4)]

Several commenters pointed out the increased fluidity in terms of working for others that can be associated with using applications or platforms to access work.

"explained with respect to its business that workers "are free to work with anyone they want, including our competitors. Most importantly . . . they can do it in real time—even while they're logged into our app. If [they] find a better work opportunity (or work that's simply more appealing to them), they can switch back and forth."

DoorDash

What input commenters had about including the ability to work for others within the control factor? [Cont.]

"noted that "rideshare drivers often work for different app-based companies simultaneously. Anyone who calls for a ride using [Uber] has noticed the driver's car also bearing a Lyft sticker. . . This situation is common in gig work, where the companies are, in effect, bidding for the same workers." CEI further noted the Department's concern that the framing in the 2021 IC Rule, which indicated independent contractor status if a worker had the ability to work for others, fails to distinguish between work relationships where a worker has multiple jobs in which they are dependent on each employer and do not exercise the control associated with being in business for oneself, and relationships where the worker has sought out multiple clients in furtherance of their business. CEI stated: "The framing does not distinguish between the two scenarios because there is no significant distinction. A worker who has 'sought out multiple clients in furtherance of their business' is no less dependent on those clients than the hypothetical worker with multiple jobs." CEI suggested that the only solution to this problem was beyond the scope of this rulemaking and would require Congress to amend the FLSA to "carve out specific professions."

CEI

"did not view "multi-apping" as a unique concept that could not be addressed within the economic reality test, arguing that a "worker who attempts to leverage earnings between two app-based platforms ('multiapping') [is] now simply dependent on two platform companies for which the employee is waiting around for work to perform. This is not indicative of the worker exercising initiative to develop a business for themselves independent of these platform companies."

UFCW

- The Department does not believe that the ability to use applications or platforms to access work necessitates changing how the ability to work for others is weighed when determining employee or independent contractor status.
- The Department reiterates that as always, the overall test is economic dependence. Even if a worker has the ability to more fluidly move among potential employers while performing work by using multiple applications, this does not necessarily mean that the entire control factor weighs in favor of independent contractor status.

What input commenters had about including the ability to work for others within the control factor? [Cont.]

- Nor is it dispositive of whether the worker is in business for themself rather than being subject to the control of the entity for whom they are performing work at any given time.1

1. See, e.g., **Razak, 951 F.3d at 145–46** (discussing disputed facts regarding whether drivers could drive for other services simultaneously—Uber contended drivers could drive for other services, but drivers contended that they could not accept rides from other platforms while online for Uber).

"posited that the Department's proposal "adopts an antiquated view of economic independence in its consideration of a worker's ability to work for others under the control factor" because "low-wage earners may, in fact, gain independence by maintaining the flexibility to work with multiple hiring entities,"

SHRM

"observed that in "low-wage industries, particularly in services such as transportation, delivery, or home care, many workers juggle multiple jobs with multiple entities not as an exercise of their own business judgment but as a necessity to cobble together a living wage in an underpaying economy."

SHRM

"described a current client who "often has to work for a variety of gig economy jobs simultaneously, such as Uber Eats, GoPuff, Instacart, and Caviar, to keep her finances afloat."

LCCRUL & WLC

" Further supporting the notion that the ability to work for multiple employers simultaneously does not necessarily indicate independent contractor status, the NDWA explained that home care workers may work for more than one third-party agency at the same time, "given the scheduling irregularities and occasional disruptions in assignments that are an unavoidable part of the inhome personal care industry." However, it noted that "[w]hile home care workers may choose to have multiple employers at the same time, it does not defeat the conclusion that they are employees rather than independent contractors."

NDWA

What input commenters had about including the ability to work for others within the control factor? [Cont.]

- After considering these comments, the Department declines to add a statement to the regulatory text stating that a worker's ability to work for others indicates independent contractor status.
- The Department believes that having multiple jobs can too often be necessary for financial survival in the modern economy, as many commenters and courts have noted. ***[(449) See supra, section V.C.3.]***
- For example, an employee may have two jobs, several part-time jobs, or a regularly-recurring seasonal job in addition to a full-time employment situation, and an independent contractor may also have multiple customers based on their exercise of business initiative. Thus, the mere ability to work for others is not necessarily an indicator of employee or independent contractor status.

Some commenters urged the Department to create an exception for industries like trucking where legal requirements make it more complicated for drivers to use the same equipment to work for another motor carrier. See e.g., NHDA, Scopelitis, Garvin, Light, Hanson & Feary.

"observed that "the ability to work for others is key to whether a driver is economically dependent or not," noting that "the Department's emphasis that both direct prohibitions on working for others and indirect barriers are relevant to this factor" was "[e]specially important" because their members experienced working arrangements where they were nominally permitted to carry loads for other carriers, but "this flexibility is not available in practice."

Real Women in Trucking

- *This situation was addressed by the Seventh Circuit in a recent decision where the company retained sole discretion to deny the driver's request to haul freight for another carrier, and it also reserved the right to arrange for third-party monitoring of compliance with federal safety regulations at the driver's expense if he drove for other carriers.* ***[(450) Brant, 43 F.4th at 669–70]***
- Further, even if the driver received approval to haul for another carrier and could have afforded to pay for third-party compliance monitoring, he would have been required to remove or cover the company's identification on his truck and to display his own or the other company's information.//// ***[(451) Id.]***

What input commenters had about including the ability to work for others within the control factor? [Cont.]

- The court determined that these facts, showing that the company's "system for approving and monitoring trips made for other carriers was so complex and onerous that Drivers could not, as a practical matter," haul loads for other carriers, weighed in favor of employee status. [1]
- Although the Department is recognizing in this final rule that actions taken by a potential employer for "the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation" are not indicative of control, the Department continues to believe that where a business goes beyond compliance with the law or regulation in a way that serves the business's own compliance methods—for example, the system described in Brant that imposed several restrictions on the driver's ability to haul freight for others, including requiring the driver to pay for a third-party monitor—this may be indicative of control.
- Therefore, the Department declines to adopt a more blanket, imprecise provision pertaining to industry-specific limitations on the ability to work for others.
- Moreover, commenters and the Brant decision have prompted the Department to conclude that the regulatory proposal addressed indirect means of limiting workers' ability to work for others too narrowly, as it only would have recognized situations in which the potential employer "places demands on workers' time" that do not allow them to work for others.

[(453) 87 FR 62275 (proposed § 795.110(b)(4))]

1. (452) Id. (analyzing the driver's ability to haul freight for other carriers under the opportunity for profit or loss factor because it was relevant to whether the driver could exercise his managerial skill to increase profits by selecting more favorable loads or by driving for other carriers) (internal quotation marks omitted).

"noted, "whether a worker is truly free to work for others requires an examination of the facts on the ground; businesses may place demands on time or monetary penalties that effectively preclude a worker from seeking other work." Because businesses may impose financial demands or other restrictions on workers' ability to work for others such as the "complex and onerous" system in Brant—in addition to demands on time that do not allow them to work for others—the Department is revising the regulatory language in the final rule to encompass such situations. The revised text removes the word "time" and adds the words "or restrictions" after "or places demands" to more accurately capture indirect means of limiting workers' ability to work for others. "

NELP

What input commenters had about including the ability to work for others within the control factor? [Cont.]

"urged the Department to add additional considerations that are related to a potential employer limiting a worker's ability to work for others. First, it contended that platform companies essentially coerce workers to continuously accept work (which would preclude them from working for others) by threatening to terminate workers from the platform or reduce the availability of work shifts unless the worker continuously accepts jobs. Additionally, it noted that an employer may prohibit workers from developing their own business or customer base, for example, by prohibiting a platform worker from doing any independent work for customers they connect with through the app."

UFCW

"also described clients—a tow truck driver and a cannabis dispensary delivery driver—who similarly were not able to work for others because they were expected to be on call all day waiting for assignments."

LCCRUL & WLC

- The Department agrees that these types of facts could be relevant to whether a potential employer has either explicitly limited the worker's ability to work for others or has placed demands or other restrictions on workers that do not allow them to work for others.
- However, the Department views these as encompassed within the final regulatory text, such that there is no need to add additional language.

"encouraged the Department to view the ability to work for others within a working arrangement as "relevant, but not determinative of the relationship" and as "one of several considerations within the 'control' factor."

OOIDA

- The Department reaffirms that the ability to work for others is just one consideration within the control factor and agrees with the commenter that it is relevant, but not determinative, of whether the worker is an employee or independent contractor.
- Moreover, the control factor itself is not determinative of a worker's status—the economic reality test is a totality-of-the-circumstances test where no one factor is dispositive. [1]

1. (454) See, e.g., **Flint Eng'g, 137 F.3d at 1441** ("None of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach.").

What example would clearly represent how the control factor is to be applied?

The Department is finalizing the ability to work for others portion of control factor at § 795.105(b)(4) with the revisions discussed herein. The exmemplify how this factor is to be applied, lets review Registered Nurse Scenarios.

EMPLOYEE

- A registered nurse provides nursing care for Alpha House, a nursing home.
- The nursing home sets the work schedule with input from staff regarding their preferences and determines where in the nursing home each nurse will work.
- Alpha House's internal policies prohibit nurses from working for other nursing homes while employed with Alpha House in order to protect its residents.
- In addition, the nursing staff are supervised by regular check-ins with managers, but nurses generally perform their work without direct supervision.
- While nurses at Alpha House work without close supervision and can express preferences for their schedule, Alpha House maintains control over when and where a nurse can work and whether a nurse can work for another nursing home.
- These facts indicate employee status under the control factor.

CONTRACTOR

- Another registered nurse provides specialty movement therapy to residents at Beta House.
- The nurse maintains a website and was contacted by Beta House to assist its residents.
- The nurse provides the movement therapy for residents on a schedule agreed upon between the nurse and the resident, without direction or supervision from Beta House, and sets the price for services on the website.
- In addition, the nurse simultaneously provides therapy sessions to residents at Beta House as well as other nursing homes in the community.
- The facts—that the nurse markets their specialized services to obtain work for multiple clients, is not supervised by Beta House, sets their own prices, and has the flexibility to select a work schedule–indicate independent contractor status under the control factor.

What impacts worker classification as an Independent Consultant under this factor?

An employers ability to explicitly limit the workers ability to work for others.

OR

An employers ability to place demand on worker' time that do not allow them to work for others.

Question	Answer
Will this factor determine the overall worker classification?	**No.** The control factor itself is not determinative of a worker's status—the economic reality test is a totality-of-the-circumstances test where no one factor is dispositive.
Will a direct contractual provision impact this factor?	**Yes.** Employers can impact the workers ability to work for others through direct prohibition within the contract. This is a very common practice impacting workers in the Information Technology (IT) and Cybersecurity industry.
How may this be done indirectly by the employer?	An employer may make demands on workers' time such that they are not able to work for other employers, or by imposing other restrictions that make it not feasible for a worker to work for others. [This is typically done for manipulation purposes through the use of fear.]

What happens if a worker holds multiple jobs?

The unique circumstances of each individual case will determine the correct worker classification. There are specific aspects that must be clearly delineated to properly classified a worker as an Independent Consultant.

Independent Contractors

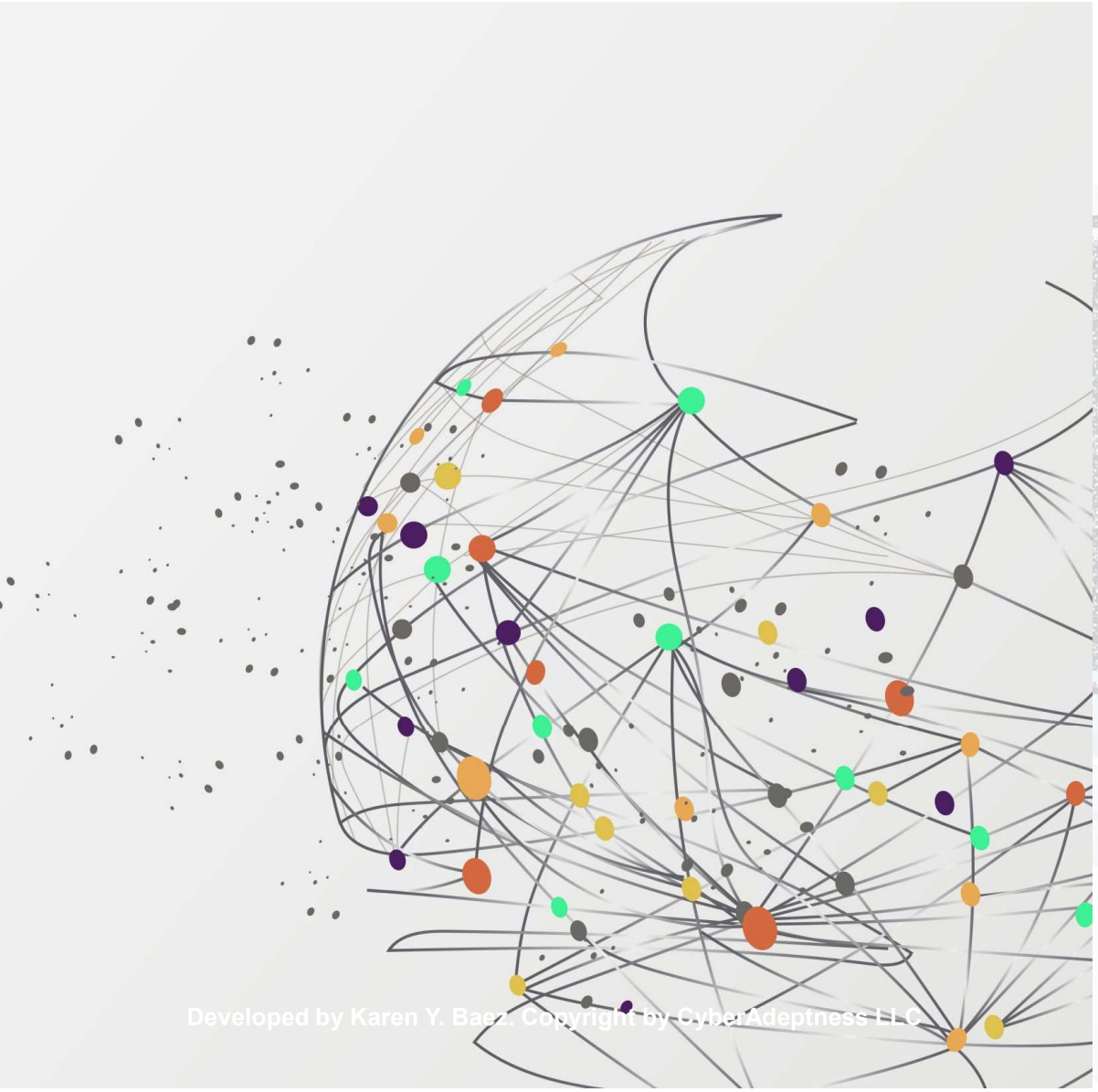
A small number of individuals provide services to multiple clients due to their ***business acumen and entrepreneurial skills***; but most importantly because their skillsets are geared towards helping the collective at large not a single employer.

Employee

In today's economy, many individuals have ***multiple lower-paying jobs to keep up with day-to-day life expenses***; however, not all individuals with multiple jobs are Independent Contractors.

The majority are employees for multiple employers.

Due to the differences noted, there are qualitative and legally significant differences in how these two scenarios should be evaluated under the economic reality test.



Extent to Which the Work Performed Is an Integral Part of the Potential Employer's Business (§ 795.110(b)(5))

Overview

2/27/2024

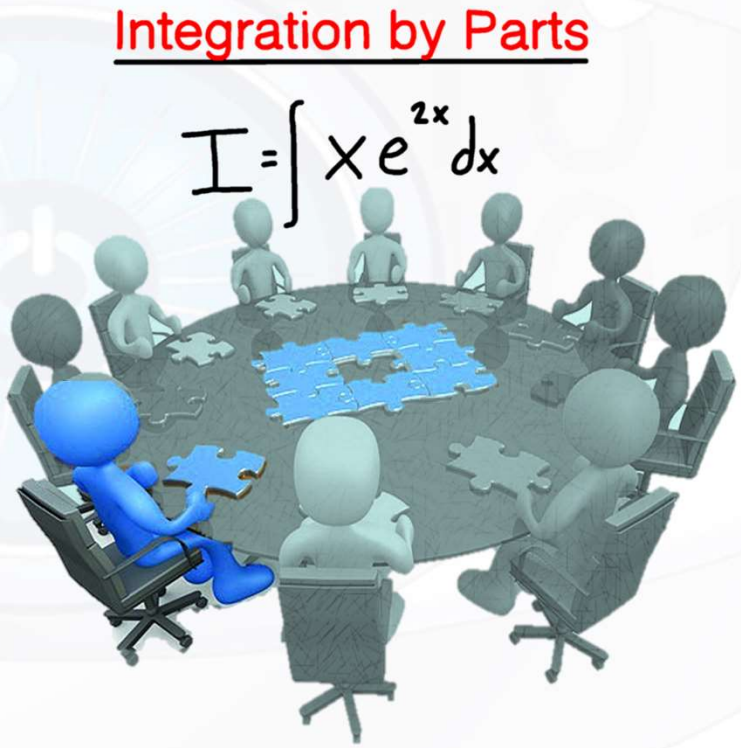
What is the department proposing?

- In § 795.110(b)(5), the Department proposed to return to framing this factor as "whether the work performed is an integral part of the employer's business." ***[(455) 87 FR 62275 (proposed § 795.110(b)(5))]***
- The Department emphasized its belief that its proposed articulation of the integral factor— which considers whether the work is "critical, necessary, or central to the employer's principal business"—better reflects the economic reality case law and is more consistent with the totality-of-the-circumstances approach to determining whether a worker is an employee or an independent contractor than the 2021 IC Rule's "integrated unit of production" framing. ***[(456) Id. at 62253.]***
- The Department explained that the 2021 IC Rule's integral formulation relied on a rigid reading of Rutherford (which noted that the work was "part of an integrated unit of production" of the employer***). [(457) Id. at 62254; Rutherford, 331 U.S. at 729]***
- Having further considered the case law, the Department concluded in the NPRM that the 2021 IC Rule's approach did not reflect Supreme Court or federal appellate court precedent. [1]
- As the 2021 IC Rule acknowledged, the Supreme Court's decision in Silk determined that coal "unloaders" were employees of a retail coal company as a matter of economic reality in part because they were "an integral part of the business[ ] of retailing coal." ***[(459) 331 U.S. at 716]***
- The 2021 IC Rule interpreted this language as merely articulating a part of the overall inquiry rather than a specific factor useful for deciding the question of economic dependence or independence.

1. (458) 87 FR 62254; see Silk, 331 U.S. at 716 (unloaders were "an integral part of the business[] of retailing coal"); see also Off Duty Police, 915 F.3d at 1055; McFeeley, 825 F.3d at 244; Scantland, 721 F.3d at 1319; Flint Eng'g, 137 F.3d at 1443; Superior Care, 840 F.2d at 1060–61; Lauritzen, 835 F.2d at 1537–38; DialAmerica, 757 F.2d at 1385; Driscoll, 603 F.2d at 755.

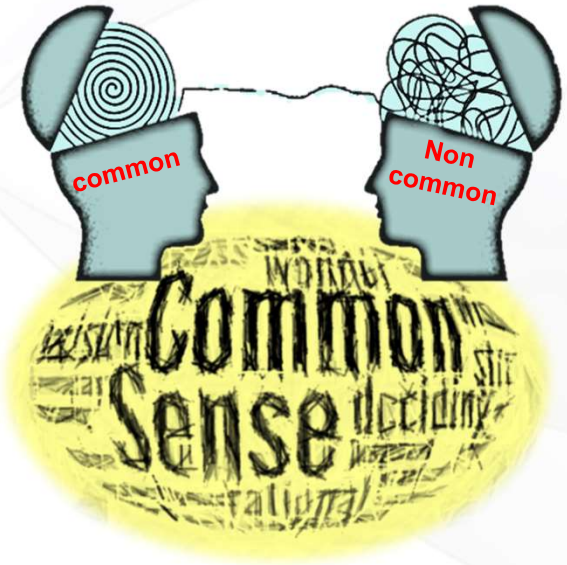
Is the department levering "integrated unit" as an enumerated factor?

- But as the Department explained in the NPRM, the Court in Silk explicitly considered the fact that the workers were an "integral part" of the business to be relevant to the inquiry, and later courts likewise found this framing to be useful to the economic reality analysis— so much so that most federal courts of appeals routinely list "integral" as an enumerated factor, but no court of appeals uses "integrated unit" for this factor. ***[(460) Id.; see supra section II.B.2]***
- Additionally, the NPRM explained that the Department has also used this proposed approach to the integral factor for decades and has consistently found it to be a useful factor in the economic reality analysis. [1]
- For these reasons, the Department proposed to eliminate the "integrated unit" factor as an enumerated factor and instead to restore the integral factor, understood by courts as being focused on whether the work is critical, necessary, or central to the potential employer's business. ***[(462) 87 FR 62254]***



1. (461) See, e.g., **WHD Fact Sheet #13 (July 2008)** (listing "[t]he extent to which the services rendered are an integral part of the principal's business" as a factor).

What do most courts leverage as their adopted approach?



- The Department explained that most courts adopt a common-sense approach to determining whether the work or service performed by a worker is an integral part of a potential employer's business. ***[(463) Id. at 62253]***
- For example, if the potential employer could not function without the service performed by the workers, then the service they provide is integral. [1]
- The Department noted that "[s]uch workers are more likely to be economically dependent on the potential employer because their work depends on the existence of the employer's principal business, rather than their having an independent business that would exist with or without the employer." [2]

1. (464) See, e.g., **Off Duty Police, 915 F.3d at 1055** (rejecting employer's argument that it was merely an agent between its customers and the officers because the company "could not function without the services its workers provide"); **McFeeley, 825 F.3d at 244** ("[E]ven the clubs had to concede the point that an 'exotic dance club could [not] function, much less be profitable, without exotic dancers.' ") (quoting Secretary of Labor's Amicus Br. in Supp. of Appellees at 24); **Capital Int'l, 466 F.3d at 309** (finding security guards were integral to a business where company "was formed specifically for the purpose of supplying" private security); cf. **Johnson, 371 F.3d at 730** (upholding jury verdict finding independent contractor status for security guards working for government housing authority and noting, with regard to integral factor, that the housing authority "had functioned for years before and after the program" under which security guards were hired).
2. **(465) 87 FR 62253**. See, e.g., **Brock v. Lauritzen, 624 F. Supp. 966, 969 (E.D. Wis. 1985), aff'd, 835 F.2d 1529 (7th Cir. 1987)** (finding that cucumber harvesters were integral to cucumber farmer's business and were "economically dependent upon Lauritzen's business for their work during the cucumber harvest season").

What do most courts leverage as their adopted approach? [Cont.]

- Additionally, courts also look at whether the work is important, critical, primary, or necessary to the potential employer's business. [1]
- In most cases, if a potential employer's primary business is to make a product or provide a service, then the workers who are involved in making the product or providing the service are performing work that is integral to the potential employer's business. [2]
- The Department emphasized that the judicial treatment of the integral factor reflects the understanding that a worker who performs work that is integral to an employer's business is more likely to be employed by the business, whereas a worker who performs work that is more peripheral to the employer's business is more likely to be independent from the employer.[3]
- Finally, the Department noted that while it is only one part of the overall inquiry, courts continue to find the integral factor useful for evaluating economic dependence.

1. (466) See, e.g., **Alpha & Omega, 39 F.4th at 1085** (noting that this factor "turns 'on whether workers' services are a necessary component of the business' ") (quoting **Paragon, 884 F.3d at 1237); Flint Eng'g, 137 F.3d at 1443** (finding rig welders' work to be "an important, and indeed integral, component of oil and gas pipeline construction work" because their work is a critical step on every transmission system construction project); **Lauritzen, 835 F.2d at 1537–38** ("It does not take much of a record to demonstrate that picking the pickles is a necessary and integral part of the pickle business[.]"); **cf. Paragon, 884 F.3d at 1237** ("Because [the worker]'s management of the pecan grove was not integral to the bulk of Paragon's [construction] business, this factor supports consideration of [the worker] as an independent contractor.").
2. (467) See, e.g., **Superior Care, 840 F.2d at 1059** (for business that provided on-demand health care personnel, the nurses provided were themselves integral to the business).
3. (468) See, e.g., **Keller, 781 F.3d 799 at 815** ("The more integral the worker's services are to the business, then the more likely it is that the parties have an employer-employee relationship."); **DialAmerica, 757 F.2d at 1385** ("workers are more

What commenters agreed with in regards to returning to the framing of this factor?

Many commenters expressed agreement with the Department's decision to return to the framing of this factor as the extent to which the work performed is an integral part of the potential employer's business. See, e.g., AFL–CIO; Century Foundation; IBT; NDWA; NELP; NWLC; ROC United; State AGs; Transport Workers Union of America.

"commented that it agreed with the statement in the NPRM that "if the [employer] could not function without the service performed by the workers, then the service they provide is integral," explaining that this factor "recognizes a simple truth: workers are more likely employees under the FLSA if 'they perform the primary work of the alleged employer.' "

NELP

"commented that "[t]his factor helpfully looks at whether the work performed is an essential or critical aspect of the business,—i.e., whether the work is critical to the main service or product that the business provides."

Century Foundation

"agreed with the NPRM's rejection of the 2021 IC Rule's "integrated unit" framing of this factor, stating that the Department's proposal "appropriately considers whether the work performed is an essential or critical aspect of the business—i.e., whether the work is critical to the main service or product that the business provides." NWLC explained that the NPRM's "framing is consistent with the long line of court decisions finding a worker's performance of work that is integral to the employer's business to be an indicator of employee status, reflecting the commonsense understanding that employers are more likely to hire employees to perform the tasks involved in providing the core products and/or services that their business offers."

NWLC

"similarly commented that it "strongly supports the return of this factor to its 'longstanding Departmental and judicial interpretation, rather than the 'integrated unit of production' approach that was included in the 2021 IC Rule.' "

AFL-CIO

"expressed support for the Department's proposed articulation of the integral factor and recommended "that guidance for this factor make explicitly clear the focus of the factor is on the work performed, not the individual worker."

IBT

What is evaluated by the department under this factor?

Whether the worker performs work that is central to the employer's business.

"stated that the final regulatory text should incorporate the text from the NPRM stating that "the focus of the integral factor is on the work performed, not the individual worker."

Outten & Golden

- As the Department explained in the NPRM, this approach evaluates whether the worker performs work that is central to the employer's business, not whether the worker possesses some unique qualities that render them indispensable as an individual. [1]
- An individual worker who performs the work that an employer is in business to provide but is just one of hundreds or thousands who perform the work is nonetheless an integral part of the employer's business even if that one worker makes a minimal contribution to the business when considered among the workers as a whole. [2]
- The Department believes that the proposed regulatory text, which states that "[t]his factor considers whether the work performed is an integral part of the employer's business" rather than "whether any individual worker in particular is an integral part of the business" sufficiently captures this understanding of the integral factor.

1. **(469) 87 FR 62254. See, e.g., Montoya v. S.C.C.P. Painting Contractors, Inc., 589 F. Supp. 2d 569, 581 (D. Md. 2008)** (explaining that "this factor does not turn on whether the individual worker was integral to the business; rather, it depends on whether the service the worker performed was integral to the business").
2. **(470) 87 FR 62254** (giving the example of one operator among many in a call center).

What commenters urged the department to do?

Some commenters urged the Department to maintain the 2021 IC Rule's framing of this factor as "integrated unit of production," expressing the view that the 2021 IC Rule's approach is more consistent with Silk and Rutherford. See e.g., Freedom Foundation; Scalia Law Clinic; U.S. Chamber; see also NELA; Outten & Golden.

"commented that Rutherford and Silk "make clear that the 'integral' factor concerns whether a worker is part of an integrated unit of production, not whether she is economically important to a business operation."

Scalia Law Clinic

"commented that "focusing the integral prong on an integrated unit of production is fully supported by the extant decisional law" stating that "[t]he Supreme Court has described this prong as considering whether the worker is part of an 'integrated economic unit' in the putative employer's business."

U.S. Chamber

"commented that the Supreme Court in Rutherford espoused the proper articulation of the factor as "integrated unit of production" explaining that " '[i]ntegral' and 'integrated' could be described as near homonyms . . . they are etymologically related words that sound similar but have different meanings."

The Freedom Foundation

"further explained that " '[i]ntegral,' in the sense described by the Department . . . means 'necessary to make a whole complete; essential, fundamental;' whereas 'integrated' in the sense used by the Supreme Court in Rutherford means 'with various parts linked or coordinated.' " The Freedom Foundation commented that it believes the Department misrelies on Silk to support its proposed framing of the integral factor, noting that "Silk did not include integrality in its list of factors, nor did it apply it as a factor of decision."

" [stated that the] factor was originally articulated as "integrated unit of production" but "[o]ver the years . . . morphed, without explanation, into whether a role was 'integral' to the business hiring the putative contractor. . . . [T]his scrivener's error has created greater confusion for businesses that want to be or work with ICs and has made it more difficult for courts to permit independent contract work".

I4AW

What is the department stance after reviewing all comments submitted?

"agreed with the Department's framing of the integral factor but stated that "[t]o provide further clarity on this factor, the DOL should recognize that the question of integration is not an either/or proposition" noting that "[w]hether the work is integral such that the business could not offer its goods or services without it . . . is important to consider" but "it does not define the outer limits of this factor." NELP explained that "[a]s the Supreme Court has recognized[,] whether the work is part of an 'integrated unit of production' also informs whether the worker is more likely to be an employee or independent contractor."

NELP

- After considering these comments, the Department is retaining the approach proposed in the NPRM, which considers whether the work performed by the worker is an integral part of the employer's business.
- As discussed below, the Department believes that its proposed approach to the integral factor is more consistent with longstanding judicial precedent and decades of Department guidance than the 2021 IC Rule's articulation of this factor, which focused on whether the worker is part of a "integrated unit of production."
- The Department notes, however, that it does not intend to preclude consideration of the potential relevance of the Supreme Court's discussion of the "integrated unit of production" in Rutherford.
- Consistent with the totality-of-the-circumstances approach, under which all relevant facts should be considered, the Department recognizes that the extent to which a worker is integrated into a business's production processes may be relevant to the question of economic dependence or independence and may be considered under any relevant enumerated factor, or as an additional factor.
- For example, as the Department expressed in the NPRM, indicators that a worker is integrated into an employer's main production processes, such as whether the worker is required to work at the employer's main workplace or wear the employer's uniform, may illustrate an employer's control over the work being performed. ***[(471) 87 FR 62254]***

What is the department stance after reviewing all comments submitted? [Cont.]

- Commenters' claims that the 2021 IC Rule's emphasis on the "integrated unit of production" is more consistent with applicable judicial precedent than the approach proposed in the NPRM stands in sharp contrast to decades of judicial precedent and Departmental guidance.
- The Supreme Court's decision in Silk determined that coal "unloaders" were employees of a retail coal company as a matter of economic reality in part because they were "an integral part of the business [ ] of retailing coal." ***[(472) 331 U.S. at 716]***
- Some commenters took the position that the Court in Silk merely mentioned the integral nature of the work performed but did not intend for it to be a factor considered in the overall inquiry.
- However, the Supreme Court in Silk emphasized that its list of factors was not intended to be exhaustive, but instead consisted of factors the Court believed would be useful to courts and agencies applying the economic reality test in the future.
- Moreover, the Court explicitly considered it relevant to the determination of employment status that the coal unloaders in Silk were an "integral part" of the retail coal business, and the majority of federal courts of appeals have likewise adopted this consideration as a relevant factor for the inquiry into economic dependence or independence. ***[(473) See supra section II.B.2]***
- Commenters attempted to cast aside decades of judicial precedent by employing an overly rigid understanding of Rutherford, an understanding that no federal court of appeals has adopted as the standard for this factor in the decades since Silk and Rutherford.
- As the Department has emphasized, the approach in this final rule is underpinned by a desire to bring consistency and clarity to the economic reality inquiry by aligning this rule with the approach taken by the majority of federal appellate case law.

What is the department stance after reviewing all comments submitted? [Cont.]

- Nearly all the federal courts of appeals expressly consider whether the work performed is an integral part of the potential employer's business as a sixth enumerated factor in the economic dependence or independence inquiry.
- The Fifth Circuit has not expressly enumerated the integral factor but has at times assessed integrality as an additional relevant factor. ***[(475) See, e.g., Hobbs, 946 F.3d at 836]***
- The Department has also long considered whether the work performed is an integral part of the employer's business as a factor in the economic realities' inquiry. [1]
- For example, in one of the Department's earliest pronouncements of the economic reality factors—a 1949 WHD opinion letter distilling the six "primary factors which the Court considered significant" in Rutherford and Silk—the first factor enumerated was "the extent to which the services in question are an integral part of the 'employer[']s' business.' ***[(477) WHD Op. Ltr. (June 23, 1949)]***
- The Department disagrees with the commenters' contention that the approach proposed by the Department and taken by nearly every federal court of appeals is a result of a misunderstanding of Rutherford, Silk, the FLSA, and the economic reality inquiry.
- The historical approach to this factor by the Department and the courts stands in stark contrast to the fact that not a single federal court of appeals identifies "integrated unit of production" as the standard for this enumerated factor of the economic reality test.

1. (476) See WHD Op. Ltr. (June 23, 1949); 27 FR 8033; WHD Fact Sheet #13 (1997); WHD Fact Sheet #13 (July 2008); AI 2015–1, available at 2015 WL 4449086.

What is the department stance after reviewing all comments submitted? [Cont.]

- Commenters identified one federal appellate decision that they contend applied Rutherford's "integrated unit of production" as the standard for this factor in an independent contractor inquiry under the FLSA, Tobin v. Anthony-Williams Mfg. Co. [1] See e.g., CPIE; CWI; DSA; IBA; N/MA.
- The decision in Tobin does not, however, stand for the proposition that the relevant standard for this factor under the enumerated factors of the economic reality test is whether workers are part of an "integrated unit of production.'
- Instead, Tobin was a factually analogous case to Rutherford where the Eighth Circuit found it relevant to the overall economic reality inquiry that the timber haulers and wood workers were part of one integrated unit of production***.[(479) Id.]***
- Consistent with the Department's discussion above, Tobin illustrates how Rutherford's "integrated unit of production" framing may be considered when relevant to the question of economic dependence.
- Moreover, the Eighth Circuit has elsewhere recognized that the extent to which the work performed is integral to the employer's business is one of the enumerated factors under the economic reality test. [2]

1. **(478) 196 F.2d 547, 550 (8th Cir. 1952)** (analyzing whether timber haulers and wood workers were "an integrated part of defendant's production set-up")
2. **(480) Alpha & Omega, 39 F.4th at 1082** (stating "[w]e assume without deciding that the economic realities test is appropriate in determining whether a worker is an employee or independent contractor under the FLSA" and articulating the sixth relevant factor as "the degree to which the alleged employee's tasks are integral to the employer's business.").

Is the department adopting the ABC Test?

A number of commenters expressed concerns that the Department's proposed articulation of the integral factor was an attempt to adopt one of the prongs of the ABC test. See, e.g., 4A's; Club for Growth; Fight for Freelancers; NRF & NCCR; U.S. Chamber; WSTA.

"that "it appears that the Proposed Rule's shift away from the Supreme Court's focus on an 'integrated unit' to whether the work is 'critical, necessary, or central' is a thinly veiled attempt to inject Prong B of the ABC test—whether the work takes place outside the usual course of the putative employer's business—into the analysis."

U.S. Chamber

The Club for Growth, NRF & NCCR, and the U.S. Chamber

"contended that the Department's proposal for the integral factor was at odds with the Department's explanation elsewhere in the NPRM that the Department believes the ABC test to be inconsistent with Supreme Court precedent interpreting the FLSA, and as such, cannot be adopted without Supreme Court or congressional alteration of the applicable analysis under the FLSA.

"commented that "[the integral factor] is the most likely to misclassify legitimate independent contractors as employees, because it is so similar to the B-prong of the ABC Test."

Fight for Freelancers

- Although there may be conceptual overlap between the Department's proposed integral factor and Prong B of the ABC test, as discussed above, the Department is not adopting an ABC test.
- The assertion that the Department's proposal regarding the integral factor is an attempt to insert Prong B of an ABC test in this rule is baseless.
- First, the integral factor is but one factor in a multifactor inquiry, where no one factor is dispositive, and where the totality of the circumstances is considered to determine the ultimate question of whether a worker is economically dependent on the potential employer for work or is in business for themself.
- The totality-of-the-circumstances test thus stands in stark contrast to an ABC test, in which each element of the test is dispositive.

Is the department adopting the ABC Test? [Cont.]

- As the Department expressly recognized in the NPRM, and reaffirms here, not all workers who perform integral work are employees, and there may be times when this factor misaligns with the ultimate result. This is entirely consistent with the totality-of-the-circumstances approach. [1]
- Prong B of the ABC test, on the other hand, is dispositive of employment status. If the hiring entity cannot show that the work being performed by the worker is outside the usual course of the hiring entity's business, employment status is found regardless of the other factors of the ABC test. ***[(482) 87 FR 62231]***
- Thus, while a worker can perform work that is integral to the potential employer's business and still be considered an independent contractor under this final rule, a worker performing work in the usual course of their potential employer's business will always be an employee under the ABC test. In this final rule, the Department is returning to the longstanding understanding of the integral factor consistent with decades of court precedent and Department guidance applying the economic reality test under the FLSA.
- Again, the Department is not adopting an ABC test.

1. (481) See, e.g., **Meyer, 607 F. App'x at 123** ("Although tennis umpires are an integral part of the U.S. Open," other factors supported determination that umpires were independent contractors.); **Perdomo v. Ask 4 Realty & Mgmt., Inc., No. 07–20089, 2007 WL 9706364, at *4 (S.D. Fla. Dec. 19, 2007)** (construction worker's work was integral to remodeling business, but economic reality factors as a whole indicated independent contractor status).

What concerns commenters expressed in regard to the workers "integral" classification?

Several commenters expressed concerns that the integral factor would lead to virtually every worker being classified as an employee since most, if not all, work performed for a business could theoretically be considered critical or necessary to an employer's business. See, e.g., Alabama Forestry Association; FMI; Goldwater Institute; MEP; NAFO; Scalia Law Clinic; U.S. Chamber.

"commented that "[a]ll work for a business is in some sense 'critical, necessary, or central to . . . [a] business,' because businesses only hire workers that add economic value."

Scalia Law Clinic

"commented "[t]his new interpretation makes it impossible to understand or apply the 'integral' factor" noting that the Department's rule "would effectively subsume virtually every contracting or subcontracting relationship because all subcontractors perform a function that the entity deems 'integral' to a product or a service— otherwise, it would not contract with them."

NAFO

"commented that "[t]he Department has mistakenly equated 'integral' with 'critical, necessary, or central to the employer's business'. . . . Taken literally, this could include every independent contractor, because a business would not hire an independent contractor unless it was 'necessary' to do so."

U.S. Chamber

explained that "[t]his is particularly the case with small businesses that need to rely on outside expertise." As an example, MEP noted that IT, security, services, marketing, or legal consulting services, may not be the main intent of the business, but they may be critical or necessary to the business.

MEP

- As a threshold matter, the Department reiterates that, as with the other enumerated factors of the economic reality test, the integral factor is just one area of inquiry that is considered along with the other factors to reach the ultimate determination of economic dependence or independence.
- The Department again emphasizes that it is "not always true that workers whose work is integral are employees.' ***[(483) 87 FR 62253]***

Would industry specific compliance requirements impact the integration factor?

Some commenters requested clarification for their specific industries, expressing concerns that in certain industries laws and regulations mandate relationships such that the work performed would be considered an integral part of the potential employer's business.

"that the extent to which the work is performed as an integral part of the employer's business within the real estate industry context, is mandated by state laws and regulations."

NAR suggested the Department's rule "should recognize such industry nuances, understanding that compliance with state statutory and regulatory provisions does not conflict with the ability to work as an independent contractor under the test."

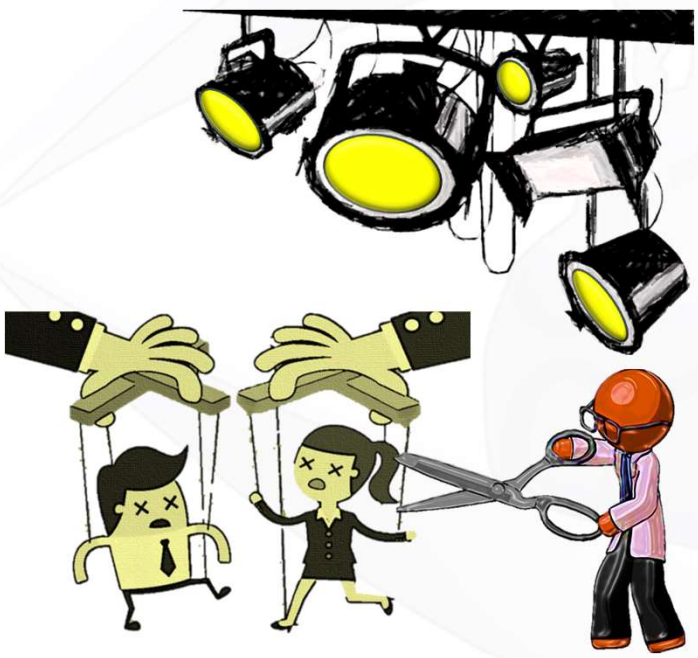
NAR

ACLI

"commented that "if insurance and/or securities industry laws and regulations compelling agents and registered representatives to affiliate with licensed insurers and broker dealers were sufficient to negate independent contractor status, this factor would perpetually weigh against independent contractor status for insurance industry relationships." ACLI requested the Department "categorically affirm that where laws or regulations dictate that an insurance worker must be affiliated with a company in the same business . . . the integral part of the business factor be viewed as at most a neutral factor."

- As the Department repeatedly states throughout this final rule, no one factor is dispositive, and the ultimate question is whether as matter of economic reality the worker is in business for themself or is economically dependent on the potential employer for work.
- If the work being performed is necessarily integral to the business of the potential employer, the integral factor may weigh in favor of employee status, but it is only one part of the inquiry. It is not dispositive.
- Where the other factors weigh in favor of independent contractor status, and the economic reality as a whole indicates the worker is in business for themself, the overall conclusion may likely be that the worker is an independent contractor; notably, compliance with specific, applicable legal obligations is addressed in the discussion of the control factor, section V.C.4.a of this preamble.

Would industry specific compliance requirements impact the integration factor? [Cont.]

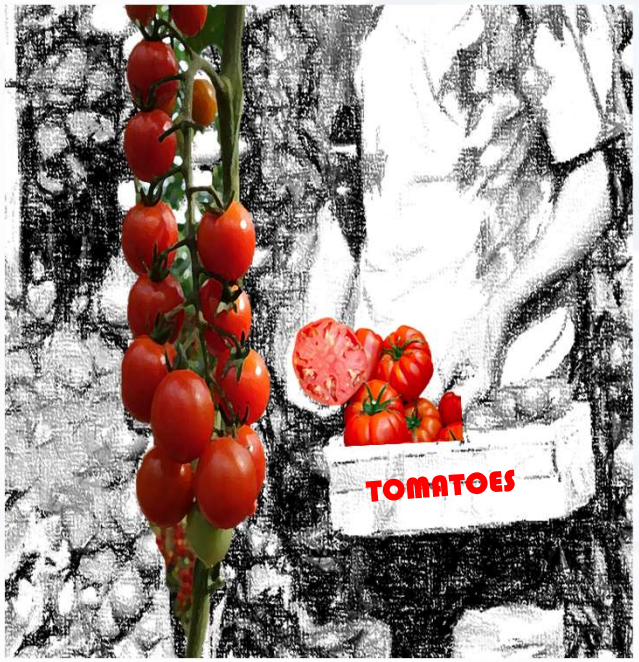


- This inquiry, however, is specific to the factual circumstances of a particular relationship, and the Department cannot broadly make a determination about the status of an entire sector of workers whose economic relationships are varied. Therefore, the Department declines to provide exemptions from a particular factor for certain industries.
- After consideration of the comments received, the Department reiterates its belief that the extent to which the work performed is an integral part of the potential employer's business sheds light on the ultimate inquiry of whether a worker is economically dependent on the potential employer for work or is in business for themself.
- The Department is returning to this framing of the integral factor in this final rule because this approach is more consistent with Supreme Court precedent, decades of judicial precedent in the federal courts of appeals, and the totality-of-the-circumstances approach than the 2021 IC Rule's "integrated unit of production" framing of this factor.
- The Department is adopting the integral factor as proposed in the NPRM with minor wording changes to provide additional clarity (adding "of the business" to the end of the second sentence of the regulatory text to state "whether the function they perform is an integral part of the business".
- The Department is finalizing the integral factor (§ 795.110(b)(5)) as discussed herein.

Tomatoes Farm Example

EMPLOYEE

- A large farm grows tomatoes that it sells to distributors.
- The farm pays workers to pick the tomatoes during the harvest season.
- Because picking tomatoes is an integral part of farming tomatoes, and the company is in the business of farming tomatoes, the tomato pickers are integral to the company's business.
- These facts indicate employee status under the integral factor



CONTRACTOR

- Alternatively, the same farm pays an accountant to provide non-payroll accounting support, including filing its annual tax return.
- This accounting support is not critical, necessary, or central to the principal business of the farm (farming tomatoes), thus the accountant's work is not integral to the business.
- Therefore, these facts indicate independent contractor status under the integral factor.

Coffee Shop Example

PRINCIPAL BUSINESS

A coffee shop's "principal" business is *making, selling, and serving coffee*.

A coffee shop might need window washers to ensure clear views and a clean appearance for customers, but the window washers are not generally integral to the principal business of the coffee shop.

Commenters maintaining that any work contracted by a business is central, necessary, or critical to its functioning overlook this important limitation of the integral factor—only work that is critical, necessary, or central to the potential employer's principal business is integral.

What is considered an integral part of a business?

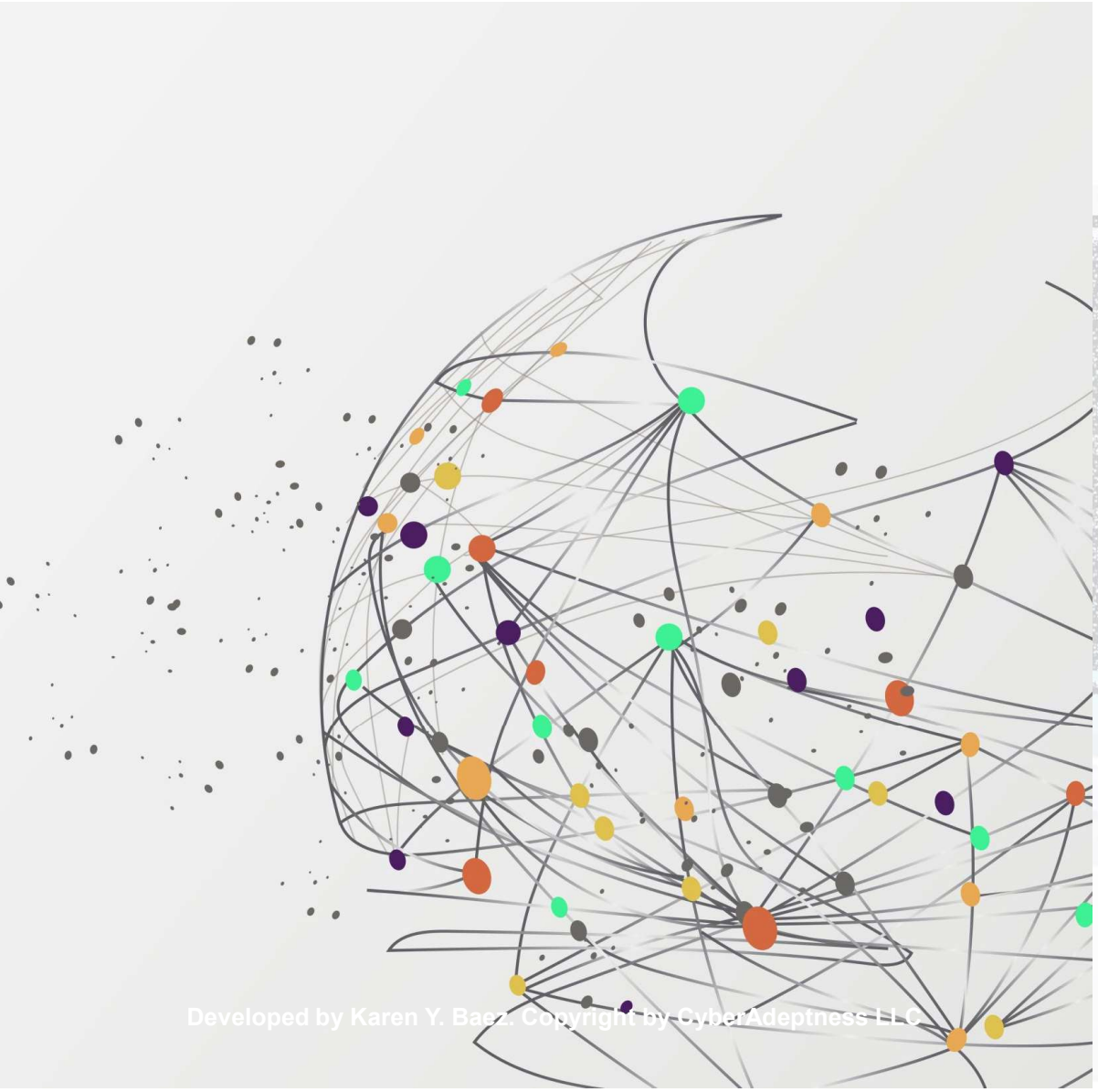
ONLY Work that is CRITICAL, NECESSARY, or CENTRAL to the potential employer's principal business.

Question	Answer
Does this mean that every contracting relations always weights in favor of employee classification?	No. The keyword in the guidance that seems to be overlook is "PRINCIPAL." As illustrated in the examples on the previous slides.
Can a final determination be made based on this factor?	No. The outcome of this factor is specific to the factual circumstances of a particular relationship and industry impacted. No single factor is dispositive, and the ultimate question is whether as matter of economic reality the worker is in business for themself or is economically dependent on the potential employer for work

How will this factor impact a worker's classification as an Independent Consultant?

If the potential employer could not function without the service performed by the workers, then the service they provide is integral to the business.

Question	Answer
Does this mean that services provided by a consultant -which may be deemed integral for an employer - flip classification to employee?	NO - not all workers who perform integral work are employees, and there may be times when this factor misaligns with the ultimate result. This is entirely consistent with the totality-of-the-circumstances approach.



Skill and Initiative (§ 795.110(b)(6))

Overview

2/27/2024

What did the department propose under the skill and initiative factor?

That the skill and initiative factor consider "whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative."

- The Department stated that *"[t]his factor indicates employee status where the worker does not use specialized skills in performing the work or where the worker is dependent on training from the employer to perform the work."*
- The Department further stated that, *"[w]here the worker brings specialized skills to the work relationship, it is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor."* ***[(484) See generally 87 FR 62275 (proposed § 795.110(b)(6))]***
- The Department explained that the proposed regulatory text for this factor would reaffirm the longstanding principle that this factor indicates employee status where the worker lacks specialized skills.
- The Department further explained that it believed that the application of initiative in connection with specialized skills is useful in answering the overarching inquiry of whether the worker is economically dependent on the employer for work or is in business for themselves, and that, as a result, it was "proposing to reintegrate initiative into this factor and no longer exclude consideration of initiative when applying this factor, as provided in the 2021 IC Rule."
- The Department then discussed the case law supporting its position that a worker's lack of specialized skills when performing the work generally indicates employee status, but also reiterated that no one factor is dispositive, consistent with the overarching economic realities analysis.

What did the department propose under the skill and initiative factor? [Cont.]

- Because both employees and independent contractors can be highly skilled and/or bring specialized skills to the work relationship, the Department discussed how focusing on whether the worker uses "the specialized skills in connection with business-like initiative" is helpful in distinguishing between the two classifications and further discussed the case law and its prior guidance supporting such an approach.
- Finally, the Department acknowledged that some facts showing an exercise of initiative can be relevant under the skill factor and another factor and explained that considering facts showing an exercise of initiative under more than one factor to the extent appropriate depending on the facts of a case is consistent with and furthers the totality-of-the-circumstances approach to assessing the economic realities of the work relationship.

What commenters who support the departments analysis stated?

In addition to the numerous comments generally supporting the Department's six-factor analysis, a number of commenters expressed support for the NPRM's discussion of the skill and initiative factor.

"stated that the NPRM's analysis "is helpful because requiring initiative as well as skill better answers the questions of whether a worker is in business for themselves."

NDWA

The Shriver Center agreed.

"stated that the NPRM's analysis "is helpful because we believe that all work is skilled work in the colloquial sense of the term, and elevating the question of whether a worker can exercise initiative as well as skill better answers the question of whether a worker is in business for themselves."

The Leadership Conference

"advised that for nurses, "adding business initiative to skill is an appropriate measure for distinguishing workers who should be classified as independent contractors . . . from those who, while they employ nursing skills in the performance of their work, do not do so in combination with the businesslike initiative needed to grow a nursing practice."

Gale Healthcare Solutions

"commented that the NPRM "appropriately recognizes that while a lack of specialized skills indicates employee status, the exercise of such specialized skills does not indicate independent contractor status absent the worker's using business-like initiative in relation to those skills."

LA Fed & Teamsters Local

"stated that the NPRM's "decision to include skill and initiative as a standalone factor is another improvement over the 2021 Rule," and that the NPRM "correctly recognizes that most work that does not require specialized skills is not performed by independent contractors (e.g., security guards, janitors, drivers, landscape workers, and call center workers)."

ROC United

"expressing agreement with also including in this factor "an analysis of whether the worker uses those skills in connection with 'business-like initiative' "

NELP

"commenting that the NPRM would correctly restore consideration of initiative to this factor and affirm that "a true independent contractor is likely to have specialized skills" and use those skills to exercise "business-like initiative"

NWLC

What other commenters requested from the department?

Some other commenters that generally supported the Department's proposal requested changes to or clarifications of the skill and initiative factor.

"stated that "[t]his is correct as far as skills" but added that, "for workers who are highly skilled, the 'skill and initiative' factor should not be used to weigh against employee status."

SMACNA

The case law, however, does not support the position that, for highly skilled workers, this factor should not weigh against employee status. ***[(486) See id. (citing cases)]***

"stated that it would appreciate clarification that, "although truck driving typically is not classified as 'skilled' labor in other contexts, it requires sufficient skill that, when combined with business-like initiative, drivers are appropriately considered independent contractors."

Real Women in Trucking

The Department agrees that consistent with the analysis for this factor and its discussion of commercial drivers' licenses (CDLs) below, this factor would indicate independent contractor status for a worker who uses truck-driving skills in connection with business-like initiative.

"stated that "courts have made clear that 'most farm labor jobs require little specialized skill' " and "encourage[d] the DOL to include reference to such cases in the Final Rule, as it has for workers in numerous other industries, such as janitors, security guards, landscape workers, and call center workers."

Farmworker Justice

The Department agrees with this characterization of the case law regarding "most farm labor jobs" and notes that it has taken that position in its own enforcement actions. [1]

1. (487) See, e.g., Perez v. Howes, 7 F. Supp.3d 715, 724–25 (W.D. Mich. 2014), aff'd, 790 F.3d 681 (6th Cir. 2015).

What other commenters requested from the department? [Cont.]

"supports the Department's proposal for this factor," "applauds the Department's recognition that several courts have already determined that certain workers including, drivers, security guards, janitors, landscape workers, and call center workers do not require specialized skills," and "recommends that guidance for this factor include specific instruction that asks courts to rely on the previous decisions finding certain occupations do not require prior experience; the workers are dependent on training from the employer to perform the work; or that the work requires no training, and thus are indicators that the relevant worker(s) lack(s) specialized skills."

IBT

The Department declines to include that type of instruction as it is unnecessary in light of these court decisions. Moreover, the Department is not intending to identify any particular occupation as lacking specialized skills in all cases.

"stated that, "[a]lthough the Proposed Rule correctly reestablishes the link between skill and business-like initiative as the raison d'etre of the factor, it does not make clear enough that the factor only points to independent contractor status when such a link is found." NELA suggested accordingly that the final rule "would be strengthened by incorporating a few key principles from the commentary into the rule itself." NELA requested that sentences from the NPRM stating that the "fact that workers are skilled is not itself indicative of independent contractor status" and that "[b]oth employees and independent contractors may be skilled workers" be added to the regulatory text." [1]

NELA

1. (488) The first sentence was at **87 FR 62255 (quoting Superior Care, 840 F.2d at 1060);** the second sentence was at **87 FR 62256.**

- The Department agrees that including versions of these sentences in the regulatory text will help sharpen the point that use of skills in connection with business-like initiative is what distinguishes between independent contractors and employees under this factor.
- Accordingly, the Department is revising the last sentence of the proposed regulatory text for this factor to be two sentences and to read (the *italicized language is new* as compared to the NPRM): "Where the worker brings specialized skills to the work relationship, *this fact is not itself indicative of independent contractor status because both employees and independent contractors may be skilled workers.*

What other commenters requested from the department? [Cont.]

- It is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor."
- The Department, however, believes that it is unnecessary to add the following sentence that NELA suggested incorporating into the regulatory text: *"To indicate possible independent contractor status, the worker's skills should demonstrate that they exercise independent business judgment."*
- This sentence would be duplicative of the existing regulatory text language that it "is the worker's use of those specialized skills in connection with business-like initiative that indicates that the worker is an independent contractor."
- The Department further believes that adding "only" to this existing regulatory text language (as NELA requested) so that it would read that it "is only the worker's use . . ." would not provide clarification, especially considering the changes that the Department is making to the regulatory text.

Numerous commenters opposed, disagreed with, and/or requested changes to, or clarifications of, the proposed skill and initiative factor.

"stated that, although it agrees that "both skill and initiative may play a role in the independent contractor calculus," it "fundamentally disagrees, however, that those considerations should be treated as a standalone factor in the economic realities calculus."

CWI

"stated that "[c]onsideration of skill and initiative as a stand-alone factor creates confusion and ambiguity, and results in the considerations under that factor being provided outsized weight in the totality of the circumstances analysis."

N/MA

"The NPRM creates a new definition of the 'skill' factor that gives it greater weight, despite precedent to the contrary.")

Scalia Law Clinic

What other commenters requested from the department? [Cont.]

- However, courts and the Department have invariably included some version of skill and initiative as a separate and distinct factor in their analyses for decades.
- Consistent with the Department's repeated statements in this final rule, this factor should not be given, as a predetermined matter, any different weight than any ofss the other factors. [1]

1. **(489) See 29 CFR 795.110(a)(2)** ("Consistent with a totality-of-the-circumstances analysis, no one factor or subset of factors is necessarily dispositive, and the weight to give each factor may depend on the facts and circumstances of the particular case."). Scalia Law Clinic further commented that, "[w]hile the 2021 [IC] Rule did not prohibit considering a worker's skill, [it] rightly excluded skill from its 'core factors.' " As explained in this final rule and as the regulatory text provides, however, the Department is rejecting the concept of "core" factors in favor of not giving a predetermined weight to any factor. See id. The 2021 IC Rule stated (and Scalia Law Clinic reiterated in its comment) that skill should be given lesser weight because highly-skilled workers can be employees and comparatively lesser-skilled workers can be independent contractors. The Department believes, however, that this is better addressed by reintegrating initiative into the skill factor for the reasons explained in the NPRM and herein and by reinforcing that all factors determine a worker's status.

"commented that the NPRM "purports to convert a standard consideration utilized by myriad independent contractor classification tests—the degree of skill required by the work—into an assessment of a worker's business acumen."

SHRM

"expressed concern that "[t]his is not only a drastic departure from a well-settled standard, but it also negates the Proposed Rule's decree that a worker's opportunity for profit or loss based on their managerial skill is relevant to their classification as an employee or an independent contractor."

"describing a focus on business-like initiative as an "amorphous qualification to an otherwise straightforward consideration"

TheDream.US

What other commenters requested from the department? [Cont.]

- Many federal courts of appeals consider initiative as part of this factor, [1] and thus, it is by no means a "drastic departure."
- Moreover, because both employees and independent contractors may be skilled workers, considering whether a worker uses specialized skills in connection with business-like initiative—rather than considering only whether the worker has specialized skills—helps to distinguish the worker's status and is probative of the ultimate question of economic dependence. [2]
- And there is no basis for asserting that the skill and initiative factor "negates" the relevance of the opportunity for profit or loss factor; both factors are relevant to the analysis even if, as explained in the NPRM, [3] some facts showing an exercise of initiative can be considered under both factors.

1. (490) See, e.g., Hobbs, 946 F.3d at 834; Parrish, 917 F.3d at 385; Cornerstone Am., 545 F.3d at 345; Express Sixty-Minutes, 161 F.3d at 305 ("The district court did not discuss initiative during its evaluation of this factor. We agree with the Secretary that the skill and initiative factor points toward employee status."); Flint Eng'g, 137 F.3d at 1443 (quoting Selker Bros., 949 F.2d at 1295); Circle C. Invs., 998 F.2d at 328; Superior Care, 840 F.2d at 1060; DialAmerica, 757 F.2d at 1387.
2. (491) See, e.g., Scantland, 721 F.3d at 1318; Flint Eng'g, 137 F.3d at 1443; Selker Bros., 949 F.2d at 1295; Superior Care, 840 F.2d at 1060; DialAmerica, 757 F.2d at 1387.
3. (492) See 87 FR 62256–57.

FSI, Coalition of Business Stakeholders, and NRF & NCCR similarly objected to the inclusion of initiative in this factor.

"stated that including initiative in the skill factor contravenes Silk and that "this alteration represents yet another way in which the Proposed Rule repeatedly and improperly emphasizes 'entrepreneurial drive' as an overarching consideration across many factors."

FSI

The Coalition of Business Stakeholders and NRF & NCCR disagreed with the inclusion of initiative in this factor and described it as "inconsistent" with Silk.

This factor, however, is consistent with Silk. The unloaders in Silk performed "simple tasks" ***[(493) 334 U.S. at 718.]*** and were employees, in part, for that reason; the Department's skill and initiative factor would likewise point to employee status for such unloaders.

What other commenters requested from the department? [Cont.]

- The "driver-owners" in Silk, on the other hand, seemed to use their truck-driving skills in a business-like way, drove for multiple clients, and were described by the Court as "small businessmen." ***[(494) Id. at 719.]***
- The Department's skill and initiative factor would likewise point to independent contractor status for such driver-owners.

"stated that emphasizing *"entrepreneurial drive"* may "lead to erroneous classification decisions because, among other considerations, some workers may strongly prefer to work as independent contractors, not for the flexibility to grow their businesses, but for the flexibility to control their workloads and to work when they want to." It added that, "while initiative is an appropriate consideration in favor of independent contractor status, its absence does not indicate that a worker is not pursuing independence."

FSI

"stated that the "the proposed rule could create uncertainty for agencies that utilize legitimate independent contractor relationships to carry out important business functions, but their freelance talent does not have entrepreneurial drive or take personal initiative to expand their business to working with other agencies or in house marketing shops."

4A's

- The Department continues to believe that whether workers with specialized skills use those skills in connection with business-like initiative is probative of their status as employees or independent contractors.
- Using such skills to "grow" or "expand" their work is a prime example of business-like initiative as the commenters recognize, but there may be other ways in which workers can use such skills in connection with business-like initiative.
- Of course, the determination of a worker's status ultimately requires consideration of the totality of the circumstances—not just the skill and initiative factor.

What other commenters requested from the department? [Cont.]

"stated that "[a]n individual could not have a specialized skill, but still take the initiative of an independent business or vice versa. If the rule were to go forward as proposed, and each factor pointed in different directions, there could be confusion as to where a ruling may come down on this one factor."

DSA

- The Department does not believe this to be the case when applying the skill and initiative factor.
- As explained in the NPRM, courts have often recognized that a worker's lack of specialized skills to perform the work indicates that the worker is an employee.
- As the Tenth Circuit, for example, has explained, *"the lack of the requirement of specialized skills is indicative of employee status."* Flint Eng'g, 137 F.3d at 1443 (quoting Snell, 875 F.2d at 811) (alteration omitted). [1]

1. (495) See also, e.g., Razak, 951 F.3d at 147; Off Duty Police, 915 F.3d at 1055–56; Iontchev, 685 F. App'x at 550; Walsh v. EM Protective Servs. LLC, No. 3:19– cv–00700, 2021 WL 3490040, at *7 (M.D. Tenn. Aug. 9, 2021); Acosta v. New Image Landscaping, LLC, No. 1:18–cv–429, 2019 WL 6463512, at *6 (W.D. Mich. Dec. 2, 2019); Acosta v. Wellfleet Commc'ns, LLC, No. 2:16–cv–02353–GMN–GWF, 2018 WL 4682316, at *7 (D. Nev. Sept. 29, 2018), aff'd sub nom. Walsh v. Wellfleet Commc'ns, No. 20–16385, 2021 WL 4796537 (9th Cir. Oct. 14, 2021); Perez v. Super Maid, LLC, 55 F. Supp. 3d 1065, 1077–78 (N.D. Ill. 2014); Harris v. Skokie Maid & Cleaning Serv., Ltd., No. 11 C 8688, 2013 WL 3506149, at *8 (N.D. Ill. July 11, 2013); Campos v. Zopounidis, No. 3:09–cv–1138 (VLB), 2011 WL 2971298, at *7 (D. Conn. July 20, 2011); Solis v. Int'l Detective & Protective Serv., Ltd., 819 F. Supp. 2d 740, 752 (N.D. Ill. 2011).

- When a worker lacks specialized skills, this factor will indicate employee status even if the worker exercises "the initiative of an independent business."
- That initiative, of course, is very relevant to the overall analysis, and the worker who lacks the specialized skills but exercises "the initiative of an independent business" may very well be an independent contractor after considering all of the factors.
- For those reasons, there should be no confusion.

What other commenters requested from the department? [Cont.]

- The landscaper example in the NPRM's discussion of the skill and initiative factor provides additional explanation; the landscaper's landscaping work does not require specialized skills, but the landscaper's use of initiative and other facts may demonstrate that the landscaper is an independent contractor. [1]

1. **(496) 87 FR 62255** ("A landscaper, for example, may perform work that does not require specialized skills, but application of the other factors may demonstrate that the landscaper is an independent contractor (for example, the landscaper may have a meaningful role in determining the price charged for the work, make decisions affecting opportunity for profit or loss, determine the extent of capital investment, work for many clients, and/or perform work for clients for which landscaping is not integral)."). DSA's statement that the examples of welders in the NPRM's discussion of the skill and initiative factor do not include the scenario where "there is no specialized skill, but the ability to independently market a business" overlooked the landscaper example that addresses that scenario.

"commented that the NPRM was "wrong to focus on 'specialized skills' as probative in determining independent contractor status." The U.S. Chamber further commented that "a focus on 'the amount of skill required' separate from a worker's initiative that impacts the worker's profits is an unnecessarily restrictive view of independent work currently being performed in the U.S. economy."

U.S. Chamber

- In making these arguments, however, the U.S. Chamber did not rebut the substantial case law relied on by the Department explaining that the use of specialized skills in an independent or business-like way is what makes this factor probative of employee or independent contractor status.
- The Department grounds this factor in that case law.
- Citing drivers among other occupations, the U.S. Chamber added that *"[e]ven low-skilled workers can work as independent contractors if they have a skill that they can market to customers."* See also Scalia Law Clinic.

Will the skill factor impact the final determination?

NO

No ONE FACT OR FACTOR ALONE determines the final outcome. ALL Applicable Factors MUST Be analyzed.

- The Department agrees, as stated above, that workers lacking specialized skills can be independent contractors when all of the factors are considered.
- In addition, the Department continues to believe that the landscaper example in the NPRM's discussion of this factor, an example which the Department reaffirms, addresses that scenario.[1]
- Moreover, no one fact or factor determines whether a worker of any skill level is an employee or independent contractor.

1. (497) See also **Iontchev, 685 F. App'x at 550–51** (finding that the "service rendered by the Drivers did not require a special skill," but concluding that, "[u]nder the totality of the circumstances, the Drivers were not economically dependent upon [the employer]" and thus independent contractors).

What other commenters requested from the department? [Cont.]

"described the Department's articulation of this factor as "unreasonably narrow" and stated that the Department "should recognize a wide variety of skills that demonstrate an individual's business-like initiative." It added that the Department "should not be in the business of judging which skills are considered specialized or nonspecialized or place high or low value on the skills independent contractors provide."

MEP

As noted in the NPRM, courts have identified some occupations where workers were found to lack specialized skills (for example, security guards, traffic control officers, drivers, janitorial work, landscaping, and call center workers). [1]

1. (498) See, e.g., **Razak, 951 F.3d at 147** (noting that it "is generally accepted that 'driving' is not itself a 'special skill' " in determining that the skill factor weighs in favor of employee status); **Off Duty Police, 915 F.3d at 1055–56** (noting that "[t]he skills required to work for ODPS are far more limited than those of a typical independent contractor" in finding that the skill factor weighed in favor of employee status for security guards and traffic control workers); **Iontchev, 685 F. App'x at 550** ("The service rendered by the [taxi drivers] did not require a special skill."); **EM Protective Servs., 2021 WL 3490040, at *7** (traffic control officers require "relatively little skill" and security guards require "minimal skill," indicating employee status); **New Image Landscaping, 2019 WL 6463512**, at *6 (facts that "little or no skill was required" and "prior landscaping experience" was not required meant that skill factor favored employee status for landscapers); **Wellfleet Commc'ns, 2018 WL 4682316**, at *7 (explaining that skill factor favored employee status for call center workers because "all that Defendants required was the ability to communicate well and read a script"); **Super Maid, 55 F. Supp. 3d at 1077–78** (noting, in finding that skill factor favored employee status, that "[m]aintenance work, such as cleaning, sweeping floors, mowing grass, unclogging toilets, changing light fixtures, and cleaning gutters, does not necessarily involve such specialized skills as would support independent contractor status," and that "cleaning services, although difficult and demanding, were even less complex than those maintenance services") (internal quotation marks omitted); **Skokie Maid, 2013 WL 3506149, at *8** ("The maids' work may be difficult and demanding, but it does not require special skill," indicating employee status.); **Campos, 2011 WL 2971298, at *7** ("There is no evidence that Campos's job as a delivery person required him to possess any particular degree of skill. Campos did not need education or experience to perform his job. Although he needed a driver's license in order to legally drive his vehicle for deliveries, the possession of a driver's license and the ability to drive an automobile is properly characterized as a 'routine life skill' that other courts have found to be indicative of employment status rather than independent contractor status."); **Int'l Detective & Protective Serv., 819 F. Supp. 2d at 752** (finding that the "vast majority of the Guards' work . . . did not require any special skills").

What other commenters requested from the department? [Cont.]

- Department is seeking to ground this factor in that case law.
- Certain occupations may often lack specialized skills, but the Department cannot say that a particular occupation always lacks specialized skills.
- For example, as explained below, drivers may often lack specialized skills, but drivers with CDLs may have a specialized skill.
- Moreover, determining whether a worker has specialized skills is just one part of the inquiry, and workers who lack specialized skills may still be independent contractors.
- The landscaper example referenced above is one example of a worker who can be an independent contractor even if the work is unskilled, and this outcome is possible in other industries because a worker's classification is ultimately determined by application of all of the factors.

"recommended that "specialized skills" be changed to "skill, talent or creativity," referencing singers at restaurants among other examples"

NRF & NCCR

- Again, the Department is not seeking to limit the types of work that involve skills or taking the position that any particular occupation lacks specialized skills.
- Instead, consistent with the bulk of case law, the Department is focusing this factor on whether the worker uses their specialized skills in connection with business-like initiative—rather than only considering whether the worker has specialized skills—because that focus is probative of the ultimate question of economic dependence.
- Regarding the NPRM's statement that "[n]umerous courts have found that driving is not a specialized skill," NHDA commented that "a number of courts have found professional driving, including driving that requires a commercial driver's license (CDL), involves specialized skills" (footnote omitted). See also Scopelitis.

What other commenters requested from the department? [Cont.]

These commenters added that "[a] driver with a CDL is a clear indicator of an individual pursuing a specialized skill to engage in a business."

"commented similarly, stating that the cases relied on by the Department in the NPRM "were focused on automobile driving, not the driving of a commercial motor vehicle," and that it was "unclear whether the Department believes the driving skills required for a Class A Commercial Drivers License (CDL) are not specialized."

OOIDA

- Considering these comments and the requests for clarification, the Department clarifies that it recognizes the distinctive nature of CDLs and further recognizes that drivers performing work requiring such licenses are likely using specialized skills as compared to drivers generally. [1]
- As with any worker, consideration of whether a driver with a CDL uses that specialized skill in connection with business-like initiative determines whether this factor indicates employee or independent contractor status.

1. NRF & NCCR commented that "[t]he fact that many people have regular driver's licenses should not be viewed as in any way negating or reducing the likelihood that a contractor who meets the other factors will be properly treated as an independent contractor." As the Department has clearly and repeatedly stated, no one fact will determine a worker's status as an employee or independent contractor.

"stated that "the NPRM's interpretation would ignore any initiative that is not attributable to an individual's specialized skill," expressed concern that this factor may not always align with the ultimate outcome, and "respectfully urges DOL to interpret this factor to consider any business initiative that demonstrates an individual's economic independence, regardless of whether the initiative is attributable to any skills."

CPIE

- As an initial matter, the Department notes that it is not unusual when applying a multifactor economic realities analysis for one factor to not align with the ultimate outcome when the analysis is applied, and the totality of the circumstances is considered.
- Regardless, any business initiative by a worker is plainly relevant to the analysis and may be considered under the opportunity for profit or loss depending on managerial skill factor and other factors, as the landscaper example in the NPRM's discussion of the skill and initiative factor demonstrates.

What other commenters requested from the department? [Cont.]

This rulemaking accounts the comment made by **IBA**

"[a] true measure of economic independence would not restrict the analysis of skill and initiative to considering only specialized skills and only initiative attributable to those skills but instead would consider 'all major components open to initiative,' such as 'business management skills.' "

If not under the skill and initiative factor, the factors comprising the economic realities analysis certainly consider all types of initiative and business management skills by the worker.

"asserted that, in the case of a highly skilled worker who is asked by "one of her regular clients" to do "a task that requires far less skill" than usual, the worker "would now have to tell her client—with whom she likes to work—that she cannot provide what the client needs for this particular project, because it does not make use of her more specialized skills."

Fight for Freelancers

- The Department recognizes that using specialized skills in connection with business-like initiative does not preclude (and, in fact, may often also include) performance of lower-skilled tasks.
- Whether the worker uses specialized skills to perform the work is not determined by isolating any one task performed by the worker; instead, consistent with a totality-of-the-circumstances approach, the worker's work on the whole should be considered to determine if the worker uses specialized skills in connection with business-like initiative.

What other commenters requested from the department? [Cont.]

"stated that the Department's articulation of this factor "dispenses with all independent consideration of a worker's specialized skills obtained or developed separate and apart from the hiring entity" and "all but ensures consideration of this factor will preclude an independent contractor finding."

Coalition of Business Stakeholders

- This comment overlooks the totality-of-the-circumstances nature of the analysis; no one factor can preclude an independent contractor or employee finding.
- Contrary to this commenter's assertion, the Department believes that the worker's skills developed separate and apart from the hiring entity are relevant. The regulatory text providing that this factor indicates "employee status . . . where the work is dependent on training from the employer to perform the work" reflects that bringing skills to the work relationship (i.e., skills developed separate and apart from the employer) may indicate independent contractor status if the skills contribute to business-like initiative.

"stated that it "may benefit an outfitter to train an independent contractor, or pay for a first aid certification class, in order for the contractor to better serve out the terms of the contract."

Regarding training

America Outdoors Association

- As an initial matter, some basic training in a workplace, such as paying for a first-aid certification class, does not prevent a finding that a worker uses specialized skills to perform the work. Instead, the analysis is more general and, as the regulatory text states, should focus on whether the worker is dependent on training from the employer to perform the work.
- Finally, the revision requested by WFCA is unnecessary given that the regulatory text already provides generally that "the outcome of the analysis does not depend on isolated factors but rather upon the circumstances of the whole activity" and, "[c]onsistent with a totality-of-the-circumstances analysis, no one factor or subset of factors is necessarily dispositive." ***[(500) 29 CFR 795.110(a)(1) and (a)(2), respectively]***

Referencing a labor shortage in its industry

WFCA

"stated that "the mere fact that a contractor or dealer is willing to pay to train independent contractor should not make the worker an employee" and asked that the regulatory text be revised to reflect that."

See also ABC

What is a good example on how "Skill and Initiative" may be applied?

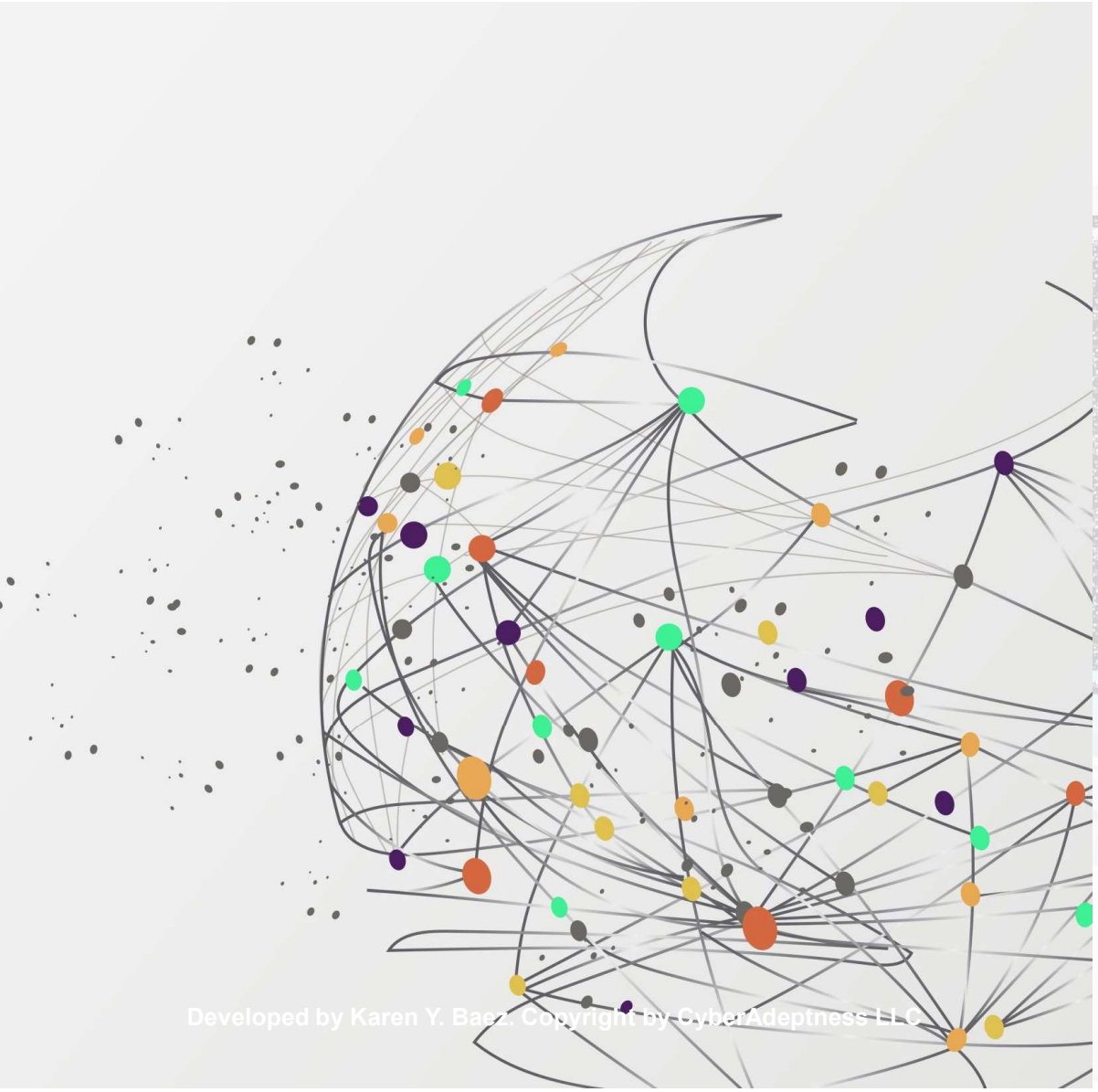
The Department is finalizing the skill and initiative factor (§ 795.110(b)(6)) as discussed herein. In order to provide an example on how this factor is to be apply, let's take a look at a WELDER.

EMPLOYEE

- A highly skilled welder provides welding services for a construction firm.
- The welder does not make any independent judgments at the job site beyond the decisions necessary to do the work assigned.
- The welder does not determine the sequence of work, order additional materials, think about bidding the next job, or use those skills to obtain additional jobs, and is told what work to perform and where to do it.
- In this scenario, the welder, although highly skilled technically, is not using those skills in a manner that evidences business-like initiative.
- These facts indicate employee status under the skill and initiative factor.

CONTRACTOR

- A highly skilled welder provides a specialty welding service, such as custom aluminum welding, for a variety of area construction companies.
- The welder uses these skills for marketing purposes, to generate new business, and to obtain work from multiple companies.
- The welder is not only technically skilled, but also uses and markets those skills in a manner that evidences business-like initiative.
- These facts indicate independent contractor status under the skill and initiative factor.



Additional Factors (§ 795.110(b)(7))

Overview

2/27/2024

Can additional factors be relevant?

YES – Enumerated Factors are NOT TO BE APPLIED Mechanically and MUST be examined along other factors.

- Section 795.105(d)(2)(iv) of the 2021 IC Rule stated that additional factors may be considered if they are relevant to the ultimate question of whether the workers are economically dependent on the employer for work or in business for themselves. ***[(501) 86 FR 1247]***
- The Department proposed to retain this provision with only minor editorial changes, moving it to § 795.110(b)(7).
- Specifically, the Department's proposed regulatory text provided that "[a]dditional factors may be relevant in determining whether the worker is an employee or independent contractor for purposes of the FLSA, if the factors in some way indicate whether the worker is in business for themself, as opposed to being economically dependent on the employer for work." ***[(502) 87 FR 62275 (proposed § 795.110(b)(7))].***
- The Department explained in the NPRM that retaining this provision would "reiterate[ ] that the enumerated factors are not to be applied mechanically but should be viewed along with any other relevant facts in light of whether they indicate economic dependence or independence." ***[(503) Id. at 62257]***

Are suggested factors exhaustive?

NO

- Additionally, it reemphasized that "only factors that are relevant to the overall question of economic dependence or independence should be considered." ***[(504) Id.]***
- The Department explained that this approach reflects the necessity of considering all facts that are relevant to the question of economic dependence or independence, regardless of whether those facts fit within one of the enumerated factors.
- The Department reasoned that this approach is consistent with the Supreme Court's guidance in Silk, where the Court cautioned that its suggested factors are not intended to be exhaustive. ***[(505) 331 U.S. at 716 ("No one [factor] is controlling nor is the list complete.")]***
- Additionally, this approach is also consistent with the approach that courts and the Department have used in the decades since Silk to determine whether workers are employees or independent contractors under the FLSA***. [(506) See generally 87 FR 62257; infra n.512]***

No ONE FACTOR is Controlling NOR a Complete List.

Will the department propose additional factors? NO

- Like in the 2021 IC Rule, the Department proposed not to identify any specific additional factors, and specifically declined to identify the "degree of independent business organization and operation," a factor considered in prior departmental guidance, as a seventh factor in the analysis.
- The Department explained that given the "focus in this proposed rulemaking on reflecting the economic reality factors commonly used by the circuit courts of appeals, the Department chose not to include the worker's 'degree of independent business organization and operation' as a seventh factor." ***[(503) 87 FR 62257]***
- The Department noted that it was not aware of any court that has used this as a standalone factor and expressed concerns that "facts that may relate to whether a worker has an independent business organization— such as whether the worker has incorporated or receives an Internal Revenue Service (IRS) Form 1099 from an potential employer—reflect mere labels rather than the economic realities and are thus not relevant." ***[(504) Id.]***

A few commenters expressed support for the Department's proposed section on additional factors. See e.g., NWLC; AFL–CIO; DSA; and State AGs.

"commented that it "agrees with the Department's retention of the 2021 IC Rule that additional factors may be considered if they are relevant to the ultimate question of economic dependence."

DSA

"expressed support for the Department's additional factors provision, noting that the Department correctly recognized that additional factors should be considered when relevant to the economic reality.

AFL-CIO

What concerns commenters express about the vagueness and lack of clarity from the factors?

Several commenters expressed concerns with a perceived vagueness and lack of clarity arising from inclusion of additional factors, and some requested that the Department delete the additional factors section from the final rule entirely.

"commented that "[t]he proposed rule does little to further define 'additional factors' which will only lead to employers, employees, and independent contractors" speculating about "how to apply this in their analysis."

IEC

"expressed concerns with what it described as an "open-ended factor" and recommended the Department delete it."

SBA

"commented that "[t]o the extent an employer has concluded its economic dependence analysis and finds that the worker is indeed an independent contractor, this final consideration could ostensibly swallow the rule."

Goldwater Institute

"expressed concerns that "[s]takeholders will have no clarity as to what additional factors may be considered in any particular case."

AFPF

"commented that "[t]he catch all phrase 'additional factors' should be removed entirely," stating that "this open ended clause could introduce innumerable other factors during labor audits with very uncertain and unpredictable outcomes."

Inline Translation Services

What commenters said about the additional factors?

Several commenters expressed concerns with a perceived vagueness and lack of clarity arising from inclusion of additional factors, and some requested that the Department delete the additional factors section from the final rule entirely.

"expressed concerns with the Department's decision not to define specific additional factors, commenting that the undefined additional factors section could create confusion as it offers "little guidance to the regulated community." [1]

The National Restaurant Association

"commented that "this catch-all factor provides [the Department] a vague and highly discretionary means by which it can determine whether there is something that 'indicates' whether a worker is economically dependent on an employer for work without historical precedent or guidance."

NAFO

"expressed that "the [Department] inserts into the Proposed Rule a mechanism whereby it can hinge its classification decision on anything it deems to 'indicate' that a worker is either in business for themselves or economically dependent on an employer, regardless of whether such consideration has historically, or ever, been considered as part of the classification analysis."

The Coalition of Business Stakeholders

See also, e.g., MEP, Promotional Products Association International.

1. (509) The Department notes that it included the additional factors provision in the 2021 IC Rule in response to the National Restaurant Association's comment in that rulemaking expressing concern about the lack of a specific regulatory provision acknowledging that additional factors could be relevant. Specifically, as explained in the 2021 IC Rule, the Restaurant Association contended that "facts and factors" that were not listed in the Department's 2020 proposal, which included two core factors and three additional factors, "may be relevant to the question of economic dependence even if they would not be as probative as the two core factors." They expressed "concern that future courts may ignore these unlisted but potentially relevant considerations in response to this rulemaking" and "requested that the Department revise the regulatory text to explicitly recognize that unlisted factors may be relevant." 86 FR 1196. 510 331 U.S. at 716.

What is the departments response to the additional factors?

- Contrary to some of the commenters' assertions, the Department reiterates that the proposed regulatory language on additional factors is consistent with and reflects decades of Supreme Court and federal appellate court precedent— as well as guidance from the Department including the 2021 IC Rule—emphasizing that the enumerated economic realities factors are not exhaustive.
- For example, the Supreme Court explained in Silk that "[n]o one [factor] is controlling nor is the list complete." ***[(510) 331 U.S. at 716.]*** Many federal courts of appeals have also emphasized that the enumerated factors are not exhaustive. [1]
- Courts have reiterated that "[t]he determination of whether an employer-employee relationship exists for purposes of the FLSA should be grounded in 'economic reality rather than technical concepts,' . . . determined by reference not to 'isolated factors but rather upon the circumstances of the whole activity.' " [2]

1. See **Sureway, 656 F.2d at 1370** (stating that "the courts have identified a number of factors that should be considered" when determining if an individual is an employee under the FLSA but noting that "the list is not exhaustive"); **Razak, 951 F.3d at 143** (noting that the Third Circuit agreed with Sureway "that 'neither the presence nor absence of any particular factor is dispositive' " and explaining that " 'courts should examine the circumstances of the whole activity,' determining whether, 'as a matter of economic reality, the individuals are dependent upon the business to which they render service' ") (internal citation omitted); **Hobbs, 946 F.3d at 836** (stating that "[b]ecause the Silk factors are non-exhaustive, we will also look to other factors to help gauge the economic dependence of the pipe welders"); **Parrish, 917 F.3d at 387** (stating that the "Silk factors being 'non-exhaustive', other relevant factors may be in play in an employee vel non analysis"); **Karlson, 860 F.3d at 1092** ("No one [factor] is controlling nor is the list complete.") (quoting Silk, 331 U.S. at 716) (internal quotations omitted); **Scantland, 721 F.3d at 1312** ("We note, however, that these six factors are not exclusive and no single factor is dominant."); **Lauritzen, 835 F.2d at 1534** ("Certain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling."); **Superior Care, 814 F.2d at 1043** (explaining that "[t]hese factors are not exhaustive" and "must always be aimed at an assessment of the 'economic dependence' of the putative employees, the touchstone for this totality of the circumstances test") (internal citation omitted).
2. **Saleem, 854 F.3d at 140** (quoting Barfield v. New York City Health & Hospitals Corp., 537 F.3d 132, 141 (2008) quoting Goldberg, 366 U.S. at 33, and **Rutherford, 331 U.S. at 730**)) (internal quotation marks omitted).

What is the departments response to the additional factors? [Cont.]

- The Department's guidance has emphasized a similar approach. For example, WHD Fact Sheet #13 has indicated that its factors are not exhaustive and stated that "the Supreme Court has held that it is the total activity or situation which controls" the inquiry and that "[t]he employer-employee relationship under the FLSA is tested by 'economic reality' rather than 'technical concepts.' " ***[(513) See WHD Fact Sheet #13 (July 2008)]***
- AI 2015–1 explained that courts "routinely note that they may consider additional factors depending on the circumstances." ***[(514) 2015 WL 4449086, at *3 n.4 (withdrawn June 7, 2017)]***
- The Department continues to believe that the additional factors section is entirely consistent with how the courts and the Department have approached the economic realities inquiry for decades, including in the 2021 IC Rule.
- Commenters expressing concerns that the consideration of additional factors will lead to confusion and uncertainty overlook several important considerations.

  - First, as mentioned, this has been the approach of the courts and the Department for decades—the enumerated economic realities factors are not exhaustive, all relevant facts should be considered, and the focus of the determination should be grounded in the economic realities as opposed to any isolated factors.

    There is no basis for the concern that the retention of a regulatory provision stating what courts, the Department, and the regulated community have understood to be part of the economic reality test under the FLSA for over 75 years will result in confusion and uncertainty as opposed to consistency and familiarity.

  - Second, the additional factors section is not unbounded and includes clear constraining language in the regulatory text, emphasizing that only those additional factors which indicate that the worker is economically dependent on the potential employer for work or in business for themself can be considered.

What is the departments response to the additional factors? [Cont.]

- This reflects the necessity of considering all facts that are relevant to the question of economic dependence or independence, regardless of whether those facts fit within one of the six enumerated factors.
- While the department declines to specify any particular additional factors, the language of the regulatory text appropriately limits the scope of potentially relevant additional facts or factors that might be considered.
- Moreover, the Department recognizes that, in many instances, consideration of additional factors will not be necessary because the relevant factual considerations can and will be considered under one or more of the enumerated factors.
- The additional factors section is simply a recognition by the Department, consistent with decades of case law, that a rule applying to varying economic relationships across sectors of the economy must be applied in a non-mechanical fashion and must focus on the totality of the circumstances.

"expressed concern that the additional factors section "has the potential to swallow the six defined factors," and that "[b]usinesses and workers alike are being asked to consider, weigh, and make significant business decisions under a test that has unlimited undefined possibilities."

The U.S. Chamber distinguished the NPRM's additional factors section from the 2021 IC Rule's section on additional factors, asserting that the 2021 IC Rule constrained or narrowed the additional factors application by, first, explicitly assigning more weight to core factors than any potentially relevant additional factors, and second, by identifying relevant additional factors."

U.S. Chamber

What did commenters suggested in regards to additional factors?

Some commenters suggested that the Department assign the category of potentially relevant additional factors less weight than the enumerated factors. See SHRM; U.S. Chamber.

- But as the Department explained in the NPRM, "to assign a predetermined and immutable weight to certain factors ignores the totality-of-the-circumstances, fact specific nature of the inquiry that is intended to reach a multitude of employment relationships across occupations and industries and over time." ***[(515) 87 FR 62236]***
- This is true both in respect to the elevation of core factors above non-core and additional factors in 2021 IC Rule, and with respect to the suggested devaluation of potential additional factors that some commenters urged here.

Other commenters asked the Department to specifically recognize certain additional factors.

"suggested that the Department identify as an additional factor "the recognition of independent contractor status for businesses under other statutes, such as the Internal Revenue Code and numerous state statutes."

DSA

"urged the Department to "consider the degree of independent business formalization (incorporation, licenses, taxes) in analyzing" independent contractor status."

TechServe Alliance

"requested that the Department consider the degree of transparency provided to a worker about the nature of the work, such as the location, scope, and pay for a particular task, as an additional factor."

ACRE et al.

"commented that the Department should recognize employment or independent contractor agreements as an additional factor relevant to the economic reality inquiry."

SIFMA

What did commenters suggested in regards to additional factors? [Cont.]

"suggested the Department recognize as an additional factor "whether it is a recognized, longstanding practice for a large segment of the industry to treat certain types of workers as independent contractors."

ABC

"urged the Department to clarify some additional factors courts have used in determining whether there is an employment relationship, stating that, for example, "the courts have considered whether the potential employer has the right to terminate the worker for any reason at any time; whether the parties are subject to an agreement indicating an intent to establish an independent contractor relationship; and whether the worker operates in the form of a corporate entity, including as a limited liability company."

A legal blogger

- After further consideration, and consistent with the NPRM, the Department declines to identify in this final rule any particular additional factors that may be relevant.
- The Department believes that the regulatory text addressing additional factors, which focuses on whether the additional factors are indicative of whether the worker is in business for themselves or is economically dependent on the potential employer for work, is sufficiently constrained to narrow the possible relevant considerations and sufficiently flexible to capture potentially relevant factual considerations that fall outside the enumerated factors. In light of this, the Department believes it is unnecessary to specify any additional factors.
- The Department previously identified the "degree of independent business organization and operation" as a seventh factor that it considered in its analysis. ***[(516) See WHD Fact Sheet #13 (July 2008)]***
- However, as noted in the NPRM, the Department is not aware of any court that has used this as a standalone factor, and the Department declines to identify this as a standalone factor in this final rule.

What did commenters suggested in regards to additional factors? [Cont.]

- Additionally, as explained in the NPRM, the Department is concerned that facts such as whether the worker has incorporated or receives an IRS Form 1099 from a potential employer reflect mere labels rather than the economic realities and are thus not relevant.
- The Department has similar concerns that contractual provisions indicating the intent of the parties to establish an independent contractor relationship also may reflect mere labels rather than the economic realities and are thus not relevant.
- To the extent facts such as the worker having a business license or being incorporated may suggest that the worker is in business for themself, they may be considered either as an additional factor or under any enumerated factor to which they are relevant.
- However, consistent with an economic reality analysis, it is important to inquire into whether the worker's license or incorporation are reflective of the worker being in business for themselves as a matter of economic reality.
- For example, if a potential employer requires a worker to obtain a certain license or adopt a certain form of business as a condition for performing work, this may be evidence of the potential employer's control, rather than a worker who is independently operating a business. [1]

1. (517) See, e.g., Safarian v. American DG Energy Inc., 622 F. App'x 149, 151 (3d Cir. 2015) (even where "the parties structure[ ] the relationship as an independent contractor, . . . the caselaw counsels that, for purposes of the worker's rights under the FLSA, we must look beyond the structure to the economic realities").

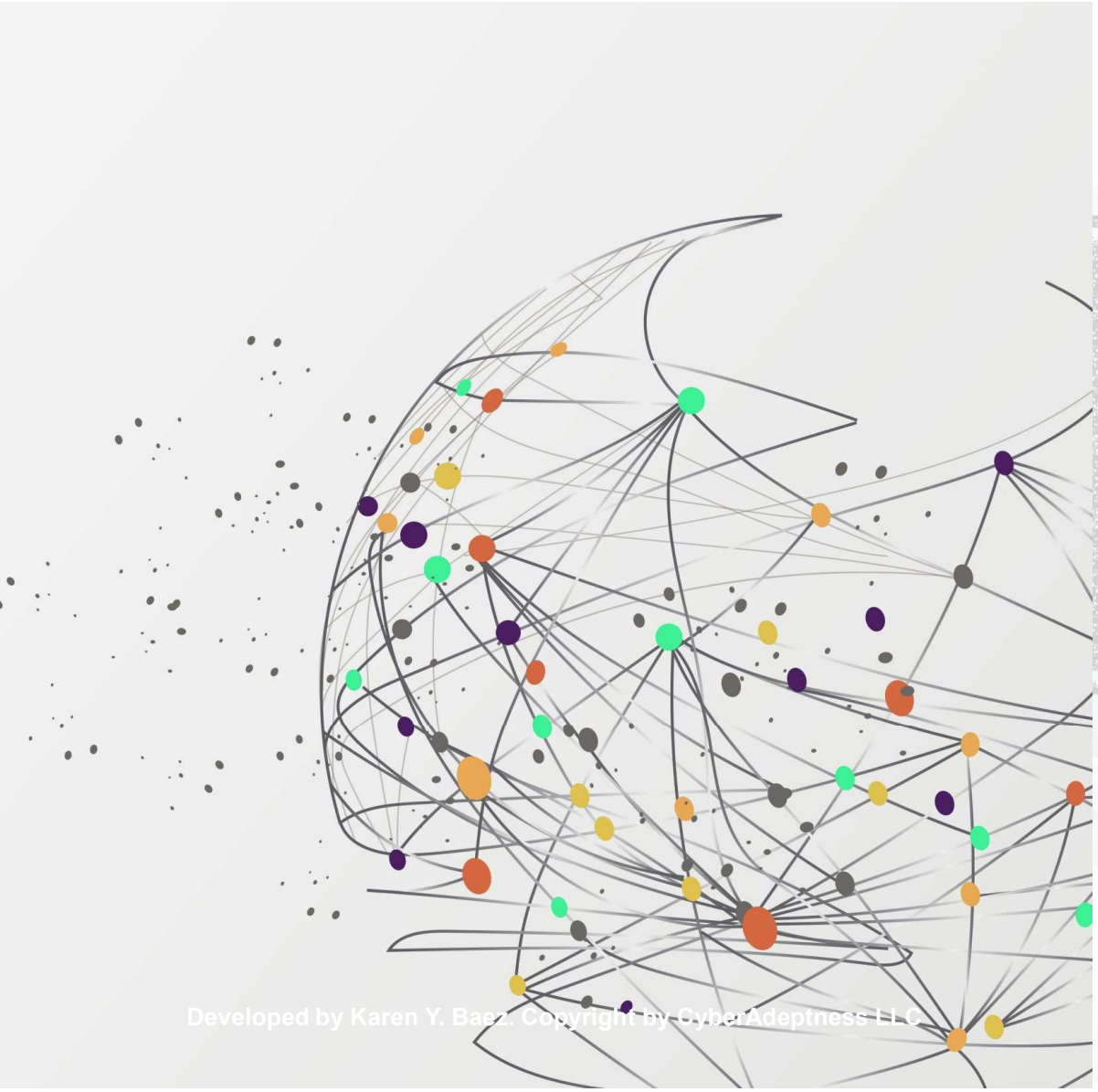
What did commenters suggested in regards to additional factors? [Cont.]

"requested that the Department clarify whether it still agrees with guidance as to the lack of relevance of certain factors expressed in WHD Fact Sheet #13. Flex urged the Department to "add guidance to the proposed rule that mirrors the subregulatory guidance in Fact Sheet #13 and make clear that the same factors previously deemed not relevant are still deemed not relevant."

Flex

- While the Department declines to identify specific factors as never relevant to the inquiry of whether a worker is economically dependent or in business for themselves, the Department agrees that certain factors are generally immaterial in determining the existence of an employment relationship because they reflect mere labels rather than the economic realities, and do not indicate whether a worker is in business for themselves or is economically dependent on a potential employer for work.
- As it has stated previously, the Department continues to believe that "such facts as the place where work is performed, the absence of a formal employment agreement, . . . whether an alleged independent contractor is licensed by State/local government," and "the time or mode of pay" do not generally indicate whether a worker is economically dependent or in business for themself***. [(518) WHD Fact Sheet #13 (July 2008)]***

The Department is finalizing the additional factors section (§ 795.110(b)(7)) as proposed with one minor editorial change as explained.



Primacy of Actual Practice (2021 IC Rule § 795.110)

Overview

2/27/2024

What did the department proposed for this section?

- The Department proposed to remove § 795.110 of the 2021 IC Rule and use that section for the discussion of the economic reality factors. ***[(519) 87 FR 62257]***
- Section 795.110 of the 2021 IC Rule provided that in determining economic dependence "the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible." ***[(520) 86 FR 1247 (§ 795.110)]***
- In the NPRM, the Department explained that this absolute rule "is overly mechanical and does not allow for appropriate weight to be given to contractual provisions in situations in which they are crucial to understanding the economic realities of a relationship." ***[(521) 87 FR 62258]***
- The Department expressed its belief that, such that contractual or a less prescriptive approach is more faithful to the totality-of-circumstances economic reality analysisther reserved rights should be considered like any other fact under each factor to the extent they indicate economic dependence. ***[(522) Id.]***
- In its proposal, the Department acknowledged that contractual authority may in some instances be less relevant, but noted that the 2021 IC Rule's position that actual practice is always more relevant is incompatible with an approach that does not apply the factors mechanically but looks to the totality of the circumstances in evaluating the economic realities.
- The Department explained that the focus is always on the economic realities rather than mere labels, but contractual provisions are not always mere labels. Instead, contractual provisions sometimes reflect and influence the economic realities of the relationship.
- The Department explained that within each factor of the test, there may be actual practices that are relevant, and there may also be contractual provisions that are relevant and that this examination will be specific to the facts of each economic relationship and cannot be predetermined. ***[(523) See generally 87 FR 62258]***

What did the department proposed for this section? [Cont.]

- In the NPRM, the Department also discussed the 2021 IC Rule's response to "comments asserting that prioritizing actual practice would make the economic reality test impermissibly narrower than the common law control test." ***[(524) 87 FR 62258]***
- The 2021 IC Rule asserted that "the common law control test does not establish an irreducible baseline of worker coverage for the broader economic reality test applied under the FLSA." ***[(525) 86 FR 1205]***
- As the Department noted in the NPRM, this view of the FLSA's scope of employment is inconsistent with the Supreme Court's observations that "[a] broader or more comprehensive coverage of employees" than under the FLSA "would be difficult to frame," ***[(526) See Rosenwasser, 323 U.S. at 362–63]*** and that the FLSA "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." ***[(527) Darden, 503 U.S. at 326]***
- The Department further explained that the "2021 IC Rule's blanket diminishment of the relevance of the right to control is inconsistent with the Supreme Court's observations that the FLSA's scope of employee coverage is exceedingly broad and broader than what exists under the common law.' ***[(528) 87 FR 62258]***
- Finally, the Department recognized that the fact that the employer's right to control is part of the common law test shows that it is a useful indicator of employee status. [1]

1. (529) Id. In Silk, the Supreme Court described this standard as "power of control, whether exercised or not, over the manner of performing service to the industry." 331 U.S. at 713 (citing Restatement of the Law, Agency, sec. 220).

What commenters who support the decision to remove 2021 IC Rule's provision stated?

Multiple commenters expressed support for the Department's decision to remove the 2021 IC Rule's provision on the primacy of actual practice.

"agreed with the NPRM's reasoning, noting "that unexercised contractual powers among the parties may be equally as relevant to determining economic dependence as exercised powers" and stating that "[t]he Department rightly recognizes that the parties' actual practice is not more relevant than any other factor as to the question of economic dependence."

State AGs

"commented that the NPRM rightly recognized "that contractual provisions can be powerful silencers; a right that is never exercised may be more significant evidence of control than a right that is routinely ignored."

NELP

"commented that they "agree with DOL's proposal to remove Section 795.110 of the 2021 IC Rule, as every fact that is relevant to economic dependence should be considered in the analysis of economic dependence, and contractual possibilities—not just actual practices—should be considered."

Gale Healthcare Solutions

"stated "a worker cannot be said to be acting independently in running their own business if they are unable to make and effectuate certain decisions because another entity has reserved power over those decisions."

LA Fed & Teamsters Locals

"commented that they support the Department's position on the primacy of actual practice "which would restore the broad, holistic test for FLSA employment, as intended by Congress."

Justice at Work Pennsylvania

What commenters who disagreed with the removal of 2021 IC Rule stated?

A number of commenters, however, expressed disagreement with the Department's proposal to remove this provision of the 2021 IC Rule.

"commented that "control has always been evaluated based upon the actual exercise of control, that is, what the actual practice of the business and worker is—not the theoretical reservation of control."

FMI

"expressed concern that the NPRM "contradicts the principle that '[i]t is not significant how one "could have" acted under the contract terms. The controlling economic realities are reflected by the way one actually acts.' "

U.S. Chamber

"urged the Department to maintain the 2021 IC Rule's position "that unexercised contractual rights are not irrelevant, they are simply not as informative as the actual experience of the parties," expressed concerns that the NPRM "turns the economic realities test into a focus on economic possibilities," and noted that "[c]ontractual provisions that are truly important necessarily manifest in the actual experiences of the worker."

N/MA

"commented that "[m]erely because an independent contractor elects not to take advantage of his or her independence or freedom says nothing about whether in fact the worker is properly classified."

Cambridge Investment Research

"commented: "To be clear, the 2021 IC Rule does not provide that unexercised rights are irrelevant. It merely states the obvious: that what the control a putative employer actually exercises is more informative than the control it could exercise."

CWI **See also CWC; MEP; NRF& NCCR.**

What is the departments stance after reviewing the comments?

- Upon considering the comments, the Department is finalizing the removal of § 795.110 of the 2021 IC Rule (Primacy of actual practice).
- Consistent with case law and the Department's historical position prior to the 2021 IC Rule, the Department declines to create a novel bright line rule that assigns a predetermined and immutable weight or level of importance to reserved rights.
- As explained in the NPRM, the Department believes a less prescriptive approach is more faithful to the totality-of-the-circumstances, economic-reality analysis, and contractual or other reserved rights should be considered like any other fact under each factor to the extent they indicate economic dependence. ***[(528) 87 FR 62258]***
- The significance of each fact in the analysis should be informed by its relevance to the economic realities and this analysis will be specific to the facts of each economic relationship and cannot be predetermined.
- Finally, the Department's approach to the reserved right to control is more consistent with the historical bounds of the control factor than the 2021 IC Rule's blanket diminishment of the relevance of the right to control, which was inconsistent with the Supreme Court's observations that the FLSA's scope of employee coverage is exceedingly broad, even more so than under the common law. ***[(531) Id.]***
- That the common law test includes the employer's right to control shows that it is a useful indicator of employee status. [1]
- As such, the Department believes that removal of this provision is appropriate. Specific concerns raised in the comments relevant to this issue are discussed and addressed in this section below.

1. (532) Darden, 503 U.S. at 323 (common-law employment test considers "the hiring party's right to control the manner and means by which the product is accomplished") (quoting Reid, 490 U.S. at 751–52); Restatement (Third) of Agency, sec. 7.07, Comment (f) (2006) ("For purposes of respondeat superior, an agent is an employee only when the principal controls or has the right to control the manner and means through which the agent performs work.").

What concerns commenters had about removing the primacy of actual practice provision?

Several commenters expressed concerns that the proposed removal of the primacy of actual practice provision was inconsistent with longstanding case law and previous guidance issued by the Department. See, e.g., CWC; DSA; FSI; Scalia Law Clinic; U.S. Chamber.

"expressed concerns that the NPRM was inconsistent with "the articulation of the control factor in Administrator's Interpretation (AI) No. 2015–1 (July 15, 2015)" which FMI contends "debunked the idea that reserved control should be a consideration." FMI also suggested that the NPRM was inconsistent with case law cited in AI 2015–1 which expressed that a "worker's control over meaningful aspects of the work must be more than theoretical—the worker must actually exercise it."

FMI See also CWC.

"commented that the 2021 IC Rule's elevation of actual practice as always more relevant than contractual or theoretical possibilities was consistent with a 1949 Opinion Letter that stated "ordinarily, a definite decision as to whether one is an employee or independent contractor under the [FLSA] cannot be made in the absence of evidence as to his actual day-to-day working relationship with his principal."

DSA

"commented that the NPRM was inconsistent with decades of court precedent holding that "the focus is on economic reality, not contractual language."

According to the U.S. Chamber, the NPRM "would effectively elevate reserved contractual rights above the actual practice of the parties" and the "economic realities test would be replaced by a contractual reservation test."

U.S. Chamber

"expressed its position that the 2021 IC Rule "ensures the true nature of the contractual relationship is considered above all but leaves room for theoretical possibilities to still be considered," which it contended is consistent with court precedent."

MEP

What's the departments response to the comments?

- Contrary to these comments, the Department's approach to this issue is consistent with both prior Departmental guidance as well as judicial precedent.
- As the Department explained in the NPRM, AI 2015–1 recognized six economic realities factors that followed the six factors used by most federal courts, including a control factor described as "the degree of control exercised or retained by the employer." ***[(533) 87 FR 62223]***
- The NPRM also noted "AI 2015–1 further emphasized that the factors should not be applied in a mechanical fashion and that no one factor was determinative.' ***[(534) Id]***
- Thus, contrary to FMI's contention, the NPRM's approach to the primacy of actual practice is consistent with AI 2015–1's non-mechanical, totality-of-the-circumstances approach to the economic dependence inquiry and the potential relevance of the reserved right to control as an indicator of economic reality. [1]
- Additionally, the Department's approach to this issue is certainly not in tension with the notion that the economic reality inquiry cannot be made without evidence of the day-today working relationship between a worker and their potential employer. [2]
- As the Department emphasizes in this final rule, it in no way intends to depart from case law which similarly emphasizes consideration of the actual behavior of the parties in deciding the economic reality inquiry. ***[(537) See infra n.541]***

1. **(535) AI 2015–1, 2015 WL 4449086, at *11 (withdrawn June 7, 2017).** Additionally, AI 2015– 1 cited, among other cases, Superior Care, for the proposition that "[a]n employer does not need to look over his workers' shoulders every day in order to exercise control." In Superior Care, even though the parties stipulated that actual practice of the parties was to have infrequent supervisory visits, the Second Circuit found more probative of control the fact that the employer "unequivocally expressed the right to supervise the nurses' work, and the nurses were well aware that they were subject to such checks as well as to regular review of their nursing notes." **Superior Care, 840 F.2d at 1060.**
2. **(536) See WHD Op. Ltr. (June 23, 1949)** ("Ordinarily a definite decision as to whether one is an employee or an independent contractor under the [FLSA] cannot be made in the absence of evidence as to his actual day-to-day working relationship with his principal.").

What's the departments response to the comments? [Cont.]

- Indeed, the Department's position is more consistent with the case law, which does not deem actual practice and reserved rights to be mutually exclusive and instead requires a nuanced consideration of all relevant facts. [1]
- Some commenters misconstrued the Department's proposal to remove the primacy of actual practice provision from the regulatory text. To be clear, the Department does not seek to elevate the weight of theoretical or contractual rights above the weight of actual practice. Rather, the Department affirms that actual practice is always relevant to the economic reality test.
- Further, the Department agrees that in many—if not most—circumstances the actual practices of the parties will be more relevant to the economic reality than reserved rights or unexercised contractual terms (as, for example, where an employer theoretically or contractually permits workers to decline work assignments, but in practice disciplines workers who decline assignments). [2]
- And, as the Department explained in the NPRM, it does not intend to in any way minimize or disregard the longstanding case law that considers the actual behavior of the parties in order to determine the economic reality. [3]

1. (538) See discussion regarding the Seventh Circuit's decision in **Brant v. Schneider Nat'l, infra.**
2. **(539) See Off Duty Police, 915 F.3d at 1060–61** (finding that, among other things, officers' testimony that they were disciplined for turning down assignments, despite having the right to do so, supported employee status).
3. (540) See, e.g., **Parrish, 917 F.3d at 387** ("[T]he analysis is focused on economic reality, not economic hypotheticals."); **Saleem, 854 F.3d at 142** ("[P]ursuant to the economic reality test, it is not what [workers] could have done that counts, but as a matter of economic reality what they actually do that is dispositive.") (internal quotation marks and citation omitted); **Sureway, 656 F.2d at 1371** ("[T]he fact that Sureway's 'agents' possess, in theory, the power to set prices, determine their own hours, and advertise to a limited extent on their own is overshadowed by the fact that in reality the 'agents' work the same hours, charge the same prices, and rely in the main on Sureway for advertising.").

What's the departments response to the comments? [Cont.]

CASE LAW

- These cases reflect a bedrock principle about the economic reality test, which looks to the reality of a situation rather than assuming that a written label, contractual arrangement, or form of business, is dispositive.
- This case law, however, does not require or even support the adoption of a generally applicable rule that in all circumstances reserved or unexercised rights, such as the right to control, are in every instance less indicative of the economic reality than the actual practices of the parties.
- Such a rule would be inconsistent with federal appellate court precedent recognizing that reserved rights may be more probative, such as the temporary nurse staffing agency in Superior Care that reserved the right to supervise the nurses even though in actuality it did so infrequently. [See Superior Care, 840 F.2d at 1060]
- The 2021 IC Rule's mandate regarding the primacy of actual practice effectively established a bright line rule that has not been adopted by courts and is in tension with longstanding instructions from courts that a totality-of-the-circumstances analysis be applied in order to analyze a worker's economic dependence.
- As such, rejecting the 2021 IC Rule's prescriptive regulation is more consistent with a non-mechanical, fact specific approach to the economic dependence or independence inquiry that has been adopted by the courts. [1]

1. (542) See, e.g., **Flint Eng'g, 137 F.3d at 1441** ("None of the factors alone is dispositive; instead, the court must employ a totality-of-the-circumstances approach."); Superior Care, 840 F.2d at 1059 ("Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided.").

What's the departments response to the comments? [Cont.]

- Some commenters seemingly conflated the terms ''economic reality'' and ''actual practice.'' See, e.g., FSI (defining ''actual practice'' as ''the economic reality of the relationship at issue'').
- Again, the Department's position is not departing from or minimizing case law holding that the focus of the inquiry is on the ''economic reality, not contractual language.'' ***[(543) See, e.g., Parrish, 917 F.3d at 388]***
- Courts routinely consider both reserved rights and actual practice in order to evaluate the overall question of economic reality. For example, the Seventh Circuit recently addressed both in Brant. ***[(544) 43 F.4th 656 (7th Cir. 2022)]***
- In that case, the court examined the operating agreement signed by the driver, which purported to grant the driver broad authority over how to conduct their work, but also ''retain[ed] the right to gather remotely and to monitor huge quantities of data about how drivers conducted their work.''
- The court rejected the company's argument that the broad grant of authority in the agreement was dispositive of independent contractor status because it found that the company exercised complete control over meaningful aspects of the transportation business, including by retaining the right to gather data that could be used to terminate the driver for noncompliance, which weighed in favor of employee status. ***[(545) Id. at 666.]***
- Moreover, none of the case law cited by commenters—and to the best of the Department's knowledge, no existing case law—stands for the proposition that reserved or unexercised rights cannot under any circumstances be indicative of the economic realities, nor does the 2021 IC Rule's provision state that reserved rights are never relevant.
- Rather, as discussed, the case law is more consistent with the approach the Department is adopting in this final rule, which recognizes that while mere contractual language is not generally driving the economic reality inquiry, reserved contractual rights, like reserved control, may in certain cases be equally as, or more, indicative of the economic reality than the actual practice of the parties.

What commenters said about scenarios identification and the applicability of the reality test?

"expressed their view that the Department "failed to identify any scenarios in which a contractual, but unexercised right would be more relevant than the parties' actual practices in assessing a worker's day-today economic realities."

N/MA

The NPRM illustrated how reserved rights might be more indicative of the economic reality than actual practice where, for example, a potential employer reserves the right to supervise workers despite rarely making supervisory visits. [1]

1. (546) See **Superior Care, 840 F.2d at 1060** ("Though visits to the job sites occurred only once or twice a month, Superior Care unequivocally expressed the right to supervise the nurses' work, and the nurses were well aware that they were subject to such checks as well as to regular review of their nursing notes. An employer does not need to look over his workers' shoulders every day in order to exercise control.")

- The mere existence of such reserved rights to control the worker may strongly influence the behavior of the worker in their performance of the work even absent the employer actually exercising its contractual rights.
- As a result, this reserved right to supervise may be more indicative of the reality of the economic relationship between the worker and the potential employer than the potential employer's apparent hands-off approach to supervision.

Several commentors also expressed concerns that the NPRM's approach will lead to an inconsistent application of the economic reality test and a lack of certainty and clarity for employers, workers, and factfinders.

"urged the Department to retain the actual practice provision from the 2021 IC Rule, noting the NPRM "implies that unexecuted contractual rights may be more important than real-world practices" and "will require HR professionals to speculate on how WHD or a court may interpret each individual criterion" which will "surely result in inconsistencies in application and the resulting confusion will lead to continued uncertainty for employers and workers."

SHRM

What concerns commenters had about actual practice on the applicability of this factor?

"expressed similar concerns about clarity, noting that "actual practice is more relevant than what may be contractually or theoretically possible . . . and it provides a clearer and simpler federal test for determining worker status for regulated employers and small businesses."

NAHB

Because the entirety of the economic reality must be considered in the analysis, the Department finds that it cannot reduce the inquiry to only actual practice and that the 2021 IC Rule's predetermined elevation of actual practice above unexercised or reserved rights is not fully consistent with the economic reality inquiry that the Department and courts have followed for decades.

"expressed concerns that the Department failed to "specify just how important such 'reserved control' is" and stated that the NPRM exacerbates "the uncertainty with which the Proposed Rule may be implemented" and "apparently directs the factfinder to weigh the control factor in favor of employee classification if a hiring entity merely possesses the ability to exercise control of a worker, regardless of whether the hiring entity ever has exercised such control." The Coalition of Business Stakeholders also commented that by including "the vague concept of 'reserved control', which is to be considered in some unstated capacity, the Proposed Rule broadens the control factor far beyond its historical bounds and creates such uncertainty that the definition of 'control' under the Proposed Rule is unworkable and would all but preclude an independent contractor finding."

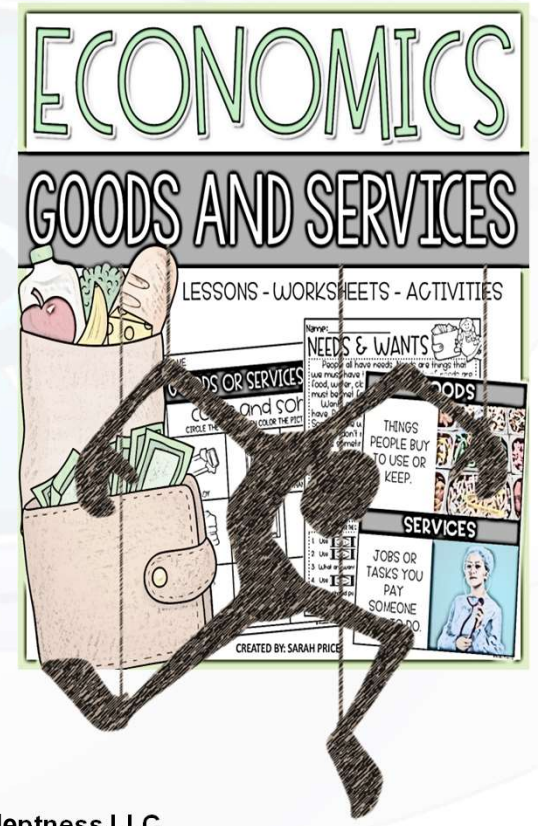
Coalition of Business Stakeholders

- The Department notes again that reserved control was included in the 2021 IC Rule. [1]
- In any event, the Coalition of Business Stakeholders misconstrues the Department's discussion of reserved control.
- The Department does not take the position that reserved rights are always indicative of economic dependence, and certainly does not preclude the existence of factual circumstances where this fact could be found to weigh in favor of independent contractor status.

1. (547) 86 FR 1204 ("As emphasized in the NPRM, and as the plain language of § 795.110 makes clear, unexercised powers, rights, and freedoms are not irrelevant in determining the employment status of workers under the economic reality test.").

What's the departments stance employer's goods and services economic control?

- Moreover, the Department reiterates, consistent with decades of case law and guidance from the Department, that "the economic reality test is a multifactor test in which no one factor or set of factors automatically carries more weight and that all relevant factors must be considered." [1]
- The notion that the Department's position that the reserved right of control can be indicative of the economic reality in some circumstances somehow makes the economic reality test "unworkable" and "all but precludes an independent contractor finding" is simply inconsistent with a multifactor totality-of-the-circumstances approach in which this is but one potentially relevant fact under one factor.
- That a potential employer's reserved right to control might indicate an employment relationship does not preclude a finding of independent contractor status based on other factual indicators of the economic reality of the relationship.



1. **(548) 87 FR 62222; see, e.g., Scantland, 721 F.3d at 1312 n.2** (the relative weight of each factor "depends on the facts of the case") (quoting **Santelices, 147 F. Supp. 2d at 1319); Selker Bros., 949 F.2d at 1293** ("It is a well-established principle that the determination of the employment relationship does not depend on isolated factors . . . neither the presence nor the absence of any particular factor is dispositive.").

What is the departments stance on contractual obligations vs. actual practice?

"expressed concerns that NPRM's approach to the primacy of actual practice was inconsistent, noting that "even accepting the Department's focus on theory, the proper application of this factor is far from clear. . . . The Proposed Rule states both that (1) '[i]t is often the case that the actual practice of the parties is more relevant to the economic dependence inquiry than contractual or theoretical possibilities,' and (2) 'in other cases the contractual possibilities may reveal more about the economic reality than the parties' practices.' "

IWF

- The Department's recognition that actual practice is often more relevant to the economic dependence inquiry than contractual possibilities is not at all inconsistent with its position that, in some factual circumstances, reserved contractual rights can be more or equally as indicative of the economic reality as the actual practices of the parties.
- The Department is rejecting the overly broad and mechanical approach that in all factual circumstances, for every worker in every industry and occupation, actual practice is always more indicative of the economic reality than reserved rights or contractual possibilities.
- The Department's position is more consistent with the case law, which does not deem these two concepts to be mutually exclusive and instead requires a nuanced consideration of all relevant facts. [1]

1. (549) See discussion regarding the Seventh Circuit's decision in Brant v. Schneider Nat'l, supra.

What did commenters felt the department was focusing on?

Some commenters felt that the Department was focusing solely on how reserved rights might be used to find employee status.

"stated that the Department was interested in reserved rights only to the extent they support finding employee status."

IWF

See also Coalition of Business Stakeholders.

"commented that it would support the NPRM's logic on the relevance of reserved rights to the economic realities test "so long as the analysis also considers the rights the worker possesses but also chooses not to exercise."

Minnesota Trucking Association

See also CLDA.

- The Department does not agree with the contention that its approach to actual practice and reserved rights would always only be used to indicate employee status. [1]
- The inquiry should take every aspect of the relationship into account if relevant to the economic reality and the worker's dependence on their potential employer.[2]

1. (550) See, e.g., **Faludi 950 F.3d at 275–76** (determining that an attorney was an independent contractor even though facts "point[ed] in both directions," such as the attorney's fairly lengthy tenure, even though he had the right to leave whenever he wanted upon giving 15 days' notice, and a non-compete clause under which the attorney worked exclusively for the company, but which the court found "does not automatically negate independent contractor status").
2. (551) See section V.C.4.a (discussing why the control factor is discussed from the employer's perspective).

What concerns commenters had with the departments statement on "reserved right"?

"expressed concerns with the Department's statement that a reserved right to supervise workers, even unexercised, "may strongly influence the behavior of the worker in [his or her] performance of the work," and this "may be more indicative of the reality of the economic relationship between the worker and the company than the company's apparent hands-off practice," noting that "even under this example a company that does not intervene is surely exercising less control than one that does."

The Club for Growth Foundation

- This comment misunderstands the relevant inquiry.
- The question is not whether a potential employer who reserves the right to control their workers can be said to exercise more control than a different potential employer who in actual practice exercises control over their workers.
- Rather, the inquiry is whether, as a matter of economic reality, a potential employer's reserved right of control is probative of a worker's economic dependence.
- The 2021 IC Rule mechanically provided that actual practice is always more relevant than reserved control.
- By removing that provision, this final rule takes the position that all relevant aspects of the working relationship, including reserved rights, should be considered, without placing a thumb on that scale.

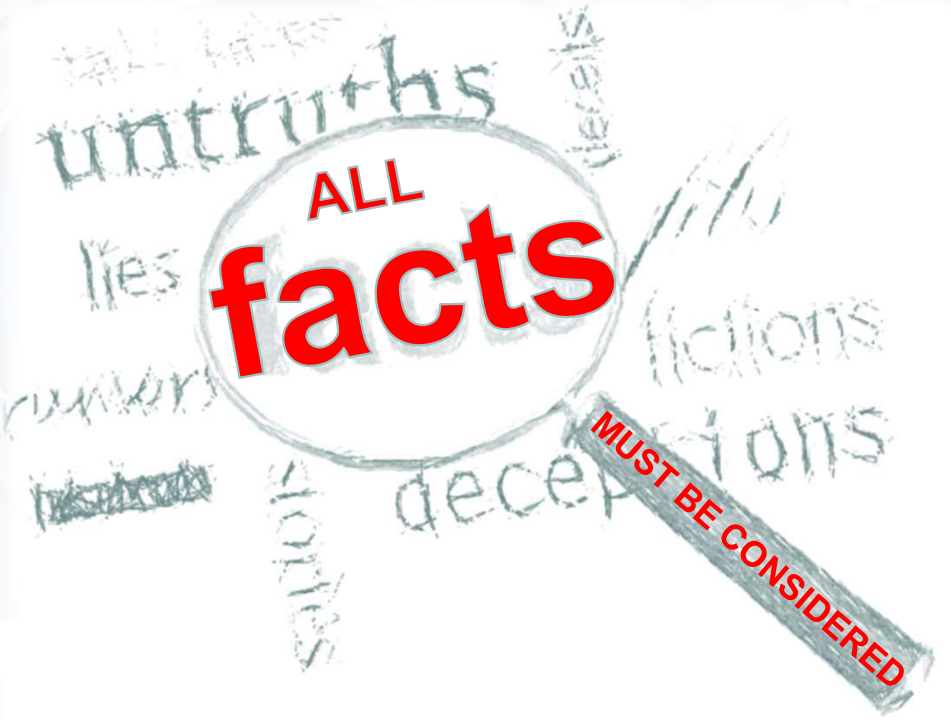
"having "contractual language eclipse actual practice would flip the economic realities on its head" and "would also prohibit certain facts from being introduced into evidence: namely, the actual practice of the parties, which according to the Supreme Court is the touchstone of the analysis."

U.S. Chamber

- The Department reiterates firmly that this final rule neither tips the scales in favor of contractual language over actual practice nor excludes the consideration of any relevant facts demonstrating economic dependence.
- Rather, the Department is merely declining to adopt a bright-line rule predetermining how relevant facts may be considered, recognizing that in some factual circumstances reserved rights may be as indicative of the economic reality as the actual practice of the parties.
- Additionally, the Department's final rule does not prohibit any subset of facts from being introduced into evidence before a factfinder, and certainly does not prohibit facts about the actual practices of the parties from being introduced into evidence.

What was the department's purpose of eliminating the 2021 IC Rule?

- To the contrary, the purpose of eliminating the actual practice provision from the 2021 IC Rule is to ensure that all facts relevant to inquiry of economic dependence or independence may be considered. [1]
- Within each factor of the test, there may be actual practices that are relevant, and there may also be contractual provisions that are relevant.
- The examination is specific to the facts of each economic relationship and cannot be predetermined.
- For all of the foregoing reasons, the Department is finalizing the removal of § 795.110 of the 2021 IC Rule (Primacy of actual practice).
- As discussed in section V.C, § 795.110 of this rule contains a new provision discussing the economic reality test and the economic reality factors.



1. (552) See **Superior Care, 840 F.2d at 1059** ("Since the test concerns the totality of the circumstances, any relevant evidence may be considered, and mechanical application of the test is to be avoided.").

Examples of Analyzing Economic Reality Factors (2021 IC Rule § 795.115)

Overview

2/27/2024

What commenters requested illustrations for each factor of the economic reality test?

- Several commenters addressed the examples that the Department provided in the proposed rule to illustrate the application of each factor of the economic reality test as applied to various factual scenarios.
- The Department provided these examples in the preamble of the proposal rather than in the final text of the regulations—as was the case with the 2021 IC Rule—to provide readers an application of the proposed factor immediately following the detailed description of each factor along with the discussion of the case law and rationale. ***[(553) 87 FR 62259]***
- Each example provided two scenarios: one where the facts indicated that a factor pointed toward employee status and one where the facts indicated that a factor pointed toward independent contractor status.
- As the Department cautioned in the NPRM, additional facts or alterations to the examples could change the resulting analysis. ***[(554) Id.]***
- Moreover, no example attempted to determine the worker's ultimate status, only which way a particular factor would point based on the described facts.
- Several commenters found the examples generally helpful or applied them to their industry practices. For instance, the Advisor Group applied the Department's skill and initiative example to financial advisors.
- A freelance writer and editor found the examples provided in the preamble to be reasonable, though they suggested that sections describing each factor were narrower than the examples suggested.

"commended the Department's "decision to provide examples of how each of the various factors have been applied in commonly occurring fact patterns."

AFL–CIO

Other commenters had concerns regarding the examples or suggested alterations to various examples.

"suggested that the investment factor example was confusing since the relative investments of a graphic designer would be dwarfed by a design firm, leading to different outcomes depending on whether the graphic designer worked for a large firm or a sole proprietor. "

CA Chamber

"suggested that this example was ambiguous because it was unclear if all the facts in the example, including the worker's investment in equipment, office space, and marketing, were required for the analysis."

Heritage Foundation

What steps is the department taking to avoid confusion?

- Regarding the investment factor example, the Department discussed relative investments in the first scenario, where a worker occasionally purchased and used their own drafting tools while working for a commercial design firm.
- These tools were minor investments that do not further the worker's independent business beyond completing specific jobs for the commercial design firm.
- Regarding the CA Chamber's concern that the size of the business would alter a relative investment analysis, the example was not intended to alter the size of the hypothetical employer.
- However, to avoid confusion, the Department is aligning the examples to ensure that both feature a "commercial design firm" as the hypothetical employer.
- Additionally, the regulatory text for the investments factor explains that, in addition to comparing the sizes of the worker's and the employer's investments, the focus should be on comparing the nature of their investments to determine whether the worker is making similar types of investments as the employer that suggest that the worker is operating independently. [1]

1. (555) The Department notes that it has edited the investment example to omit the reference to a "freelance graphic designer." While the department recognizes that independent contractors may go by many names, its intent is to ensure that the examples reflect consistent terminology. Because the Department used the phrase "independent contractor" throughout the examples.

Will the examples noted point to employee under the integral prong?

- Further, commenters were concerned that the same facts that point toward independent contractor status under the investment prong example would point toward employee status under the integral prong.
- As the Department stated in the NPRM, however, the examples are intended to be aids to apply the discussion of each proposed factor; the examples are not designed to illustrate the application of the full totality-of-the-circumstances test.
- For instance, the Department's investment example intentionally does not address whether the designer is integral to the commercial design firm, which would necessitate a separate analysis.
- Regarding the integral factor, IWF was concerned that the examples were unhelpful because they covered two different industries and did not illuminate what kinds of activities would be considered central or important.
- The Department's intent regarding this factor was to illuminate those tasks that are core to the functioning of the business, e.g., jobs which the "employer could not function without the service performed by the workers." [1]

NO! – the examples are only meant to be aids to apply the discussion, not to illustrate the application of the full totality-of-the-circumstances.

1. (555) The Department notes that it has edited the investment example to omit the reference to a "freelance graphic designer." While the department recognizes that independent contractors may go by many names, its intent is to ensure that the examples reflect consistent terminology. Because the Department used the phrase "independent contractor" throughout the examples.

What was commenters feedback on the department examples?

- Here, a farm selling tomatoes could not function without the work of those picking the tomatoes.
- However, while a business is generally required to file their tax returns, failure to do so would not immediately halt the operations of the farm, suggesting that non-payroll accounting support is "more peripheral to the employer's business." ***[(557) Id.]***

"noted that the Department's second example for skill and initiative featuring a welder should omit the fact that the welder has specialty skills, since that should not change the general analysis under this factor. Instead, it suggested that the example should clarify how the welder " 'markets those skills in a manner that evidences business-like initiative.' "

SMACNA

"noted that the skill and initiative example (featuring a welder) only drew a distinction between the two workers based on their ability to market their services where both workers have specialized skill. It proposed including an example where a worker has no specialized skill but can still market their services to demonstrate initiative."

DSA

"objected to the same example, noting that the skills of the workers "should not have to be paired with independent business marketing skills" to find that a worker is an independent contractor.

ABC

Will lack of "Specialized Skills" automatically lead to an employee classification?

NO! – Specialized Skills are not sufficient to determine worker classification.

"objected to the same example, noting that the skills of the workers "should not have to be paired with independent business marketing skills" to find that a worker is an independent contractor."

ABC

- The Department chose to display both workers as having high technical skills to illuminate the discussion regarding skill in the NPRM.
- Specialized skills are required for this factor to point to independent contractor status, but specialized skills alone are not sufficient; it is the use of those specialized skills to "contribute to business-like initiative that is consistent with the worker being in business for themself instead of being economically dependent on the employer." ***[(559) 87 FR 62254]***
- As the Department noted in the NPRM, "workers who lack specialized skills may be independent contractors even if this factor is very unlikely to point in that direction in their circumstances." ***[(560) Id. at 62255]***
- Thus the existence of specialized skills or the marketing of services, while relevant to the analysis under this factor, would not necessarily resolve the ultimate inquiry of the worker's classification.

What concerns commenters had about the skills factor?

"objected to the same example, noting that the skills of the workers "should not have to be paired with independent business marketing skills" to find that a worker is an independent contractor.

ABC

- The Department chose to display both workers as having high technical skills to illuminate the discussion regarding skill in the NPRM.
- Specialized skills are required for this factor to point to independent contractor status, but specialized skills alone are not sufficient; it is the use of those specialized skills to "contribute to business-like initiative that is consistent with the worker being in business for themself instead of being economically dependent on the employer." [87 FR 62254]
- As the Department noted in the NPRM, "workers who lack specialized skills may be independent contractors even if this factor is very unlikely to point in that direction in their circumstances." [0 Id. at 62255]
- Thus the existence of specialized skills or the marketing of services, while relevant to the analysis under this factor, would not necessarily resolve the ultimate inquiry of the worker's classification.

Several comments suggested that the Department include new industry specific examples for various factors.

"requested that the Department provide an example that would apply to on demand nursing staffing scenarios."

Gale Healthcare Solutions

"requested that specific industries, such as "video production professionals, web designers, freelance writers, [and] fashion workers" be included as examples."

4A's

"requested that a forestry example be included in the section of the rule discussing the integral factor."

NAFO

Is the Department providing additional examples that are industry specific?

NO, the examples are for GENERAL GUIDANCE ONLY.

- The Department recognizes that examples specific to an industry can provide helpful guidance for that segment of the regulated community.
- As the Department explained, however, its intent is for the examples to provide general guidance to regulated parties in this rulemaking.
- Adding examples specific to commenter industries would reduce their general applicability to other parties and would require more facts and detail than can be included to create succinct, yet helpful, examples.
- The Department mentions various industries or occupations in the examples to provide recognizable context for the reader; the examples do not provide the Department's definitive view on the ultimate outcome of the totality-of-the-circumstances analysis.

What type of examples commenters suggested or requested?

- Some commenters suggested that the Department add examples to capture newer facets of the economic reality factors.
- For instance, one commenter suggested that the Department should include an example to show how an employer's collection of data related to how a worker performs and use of that data to enhance their operations could be part of the economic reality analysis.
- *In addition, commenters suggested that the Department should provide more examples of how current facets of the economic reality test would be applied.*

"suggested that the Department should include an example where an employer implements control using algorithms."

AFL–CIO

"suggested that if the Department were to retain language under the control factor related to regulatory or contractual control, then the Department should provide "a comprehensive set of examples to illustrate that such cases would be rarities."

FLEX

"requested more examples of how the Department views reserved control and more examples regarding situations in which a worker's ability to work for others is constrained by the number of hours or days they need to work."

LeadingAge

"requested additional examples of where the Department would find a worker to be properly classified as an independent contractor, particularly under the control, investment, and skill and initiative factors."

CPIE

What type of examples commenters suggested or requested? [Cont.]

In addition, commenters suggested that the Department should provide more examples of how current facets of the economic reality test would be applied.

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"suggested that if the Department were to retain language under the control factor related to regulatory or contractual control, then the Department should provide "a comprehensive set of examples to illustrate that such cases would be rarities."

Flex

"requested additional examples of where the Department would find a worker to be properly classified as an independent contractor, particularly under the control, investment, and skill and initiative factors."

CPIE

- The Department agrees with commenters like the AFL–CIO that topics like control over data or algorithmic supervision are highly relevant to some workers and could have an impact on the economic reality test.
- However, as noted above, the purpose of the examples is to provide aids to applying the information just discussed in the preamble as to each factor.
- The Department intends for the examples to provide general guidance to regulated parties and not to be tied to the specifics of certain businesses or jobs.
- The examples reflect the Department's enforcement experience in some of the most commonly occurring scenarios.
- In addition, the Department understands that commenters such as LeadingAge would prefer more context regarding reserved control.
- However, the Department declines to add that additional context to the current examples, which were drafted to address common themes regarding each factor to illuminate the preamble discussion, not present every fact or issue presented in the proposed rule.

What type of examples commenters suggested or requested? [Cont.]

In addition, commenters suggested that the Department should provide more examples of how current facets of the economic reality test would be applied.

"requested more examples of how the Department views reserved control and more examples regarding situations in which a worker's ability to work for others is constrained by the number of hours or days they need to work."

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"requested additional examples of where the Department would find a worker to be properly classified as an independent contractor, particularly under the control, investment, and skill and initiative factors."

CPIE

- The Department is also concerned that additional results-oriented examples— such as those requested by NAHB specifically addressing when a worker would be classified as an independent contractor under certain factors—would not be helpful to the broader public.
- Such examples could leave the impression that the proper classification of workers rests on one or a handful of factors.
- To the contrary, the Department believes the current examples' focus on illustrating the basic analysis under a single factor and noting that the results indicate potential classification under each factor, but not the ultimate result, provides more useful guidance for this rule.
- Moreover, industry- or profession specific examples relaying how a worker's ultimate classification would be resolved are best addressed in sub-regulatory guidance after the issuance of this final rule as necessary.

What type of examples commenters suggested or requested? [Cont.]

Commenters suggested that the Department provide examples that mix and compare the factors together.

"suggested that the Department include examples that demonstrate the resolution of a worker's status after applying multiple factors and ArcBest Corporation provided an example applying the full economic reality test to an owner operator in the trucking industry."

Grantmakers in the Arts / ArcBest

- The Department declines to offer such examples in this rulemaking.
- While a multifactor example might appear helpful, the Department is also concerned that such an example could potentially prejudge a specific case in a specific industry or occupation not yet before the Department or a court, without adequate factual predicates.
- Moreover, such an example would undermine the Department's efforts to align the economic reality analysis with current precedent, which requires a consideration of all the factors.
- Finally, any multifactor analysis would require a larger number of facts to be useful, which may be less generally useful to workers and businesses who may not be able to analogize the given example to their current working relationships.

"commented that some examples were too similar to prior withdrawn sub-regulatory guidance."

IBA

- The Department notes that it assembled these examples, in part, by reviewing case law, opinion letters, the 2021 IC Rule, and other sub-regulatory guidance.
- Each source was consulted and helped the Department arrive at the examples provided.

Other commenters requested that the Department keep examples that were provided in the 2021 IC Rule.

"suggested that the Department keep the trucking example from the 2021 IC Rule."

Arizona Trucking Association

"noted how helpful the trucker and home repair examples were in the 2021 IC Rule."

NAWBO

What type of examples commenters suggested or requested? [Cont.]

- As explained [on the previous slide], some facets of the 2021 IC Rule's examples no longer align with the approach in this final rule.
- For instance, the 2021 IC Rule's app-based home repair example discusses investment as a component of the opportunity for profit or loss factor.
- As proposed in the NPRM and finalized here, however, the two factors are separate and evaluated independently.

Finally, some commenters suggested that the Department include examples in the final rule's regulatory text, as was done with the 2021 IC Rule.

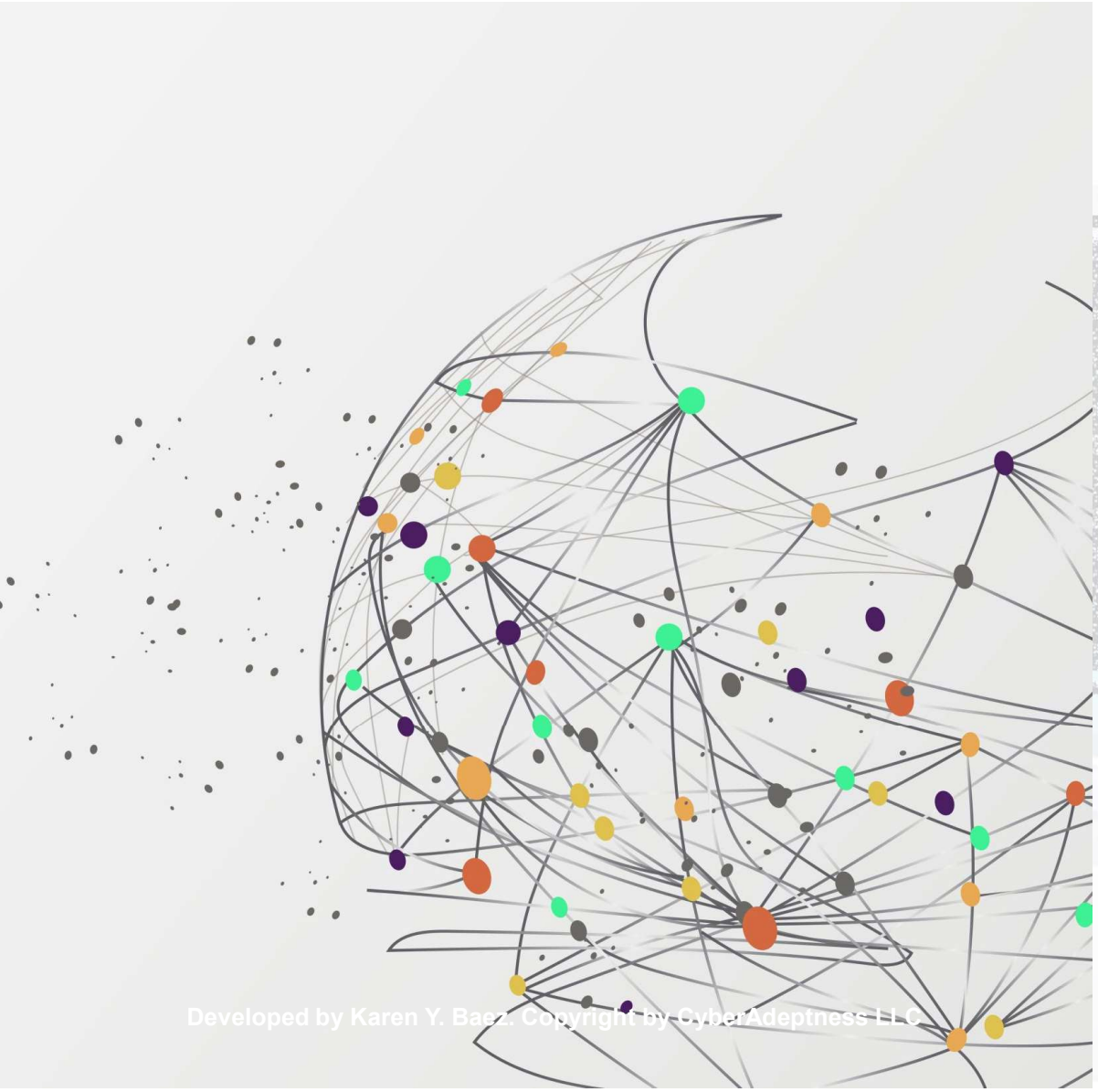
"requested that more examples be provided in the regulatory text, including those related to the integral factor."

The author of an independent contractor legal blog

"requests that examples be included in the regulatory text and that they better correlate with modern trends in employment. "

4A

- The Department recognizes that examples are helpful to workers and businesses alike.
- The Department continues to believe, however, that the examples provided in the NPRM currently provide the greatest value by residing in the preamble to the final rule following the detailed discussion of the relevant factor.
- In this way, the examples can provide a capstone for each section's discussion of the relevant economic reality factor, rather than being disconnected from that discussion and appearing only in regulatory text.
- The Department is confident that the examples initially provided in the NPRM preamble, as modified in the preamble to this final rule in response to comments received, serve this explanatory purpose.
- Over time, the Department will continue providing guidance where necessary through sub-regulatory guidance.
- As it did in the NPRM, the Department is including examples of each factor in the preamble to this final rule.
- As discussed [In the previous slide], the example of the investment factor has been clarified.
- In addition, non-substantive changes have been made to the final sentence of each paragraph in each example to clearly indicate which factor is under discussion and that the facts of each example indicate employee or independent contractor status under that factor.



Severability (§ 795.115)

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What was the departments proposal in regard to a severability provision?

- The Department proposed that the regulatory text include a severability provision. ***[(561) 87 FR 62275 (proposed § 795.115)]***
- Specifically, the Department proposed that, if any provision of its regulation ''is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from [the regulation] and shall not affect the remainder thereof.'' ***[(562) Id.]***
- The Department noted that the 2021 IC Rule contained a severability provision and that it was not proposing any edits to that provision. ***[(563) Id. at 62259]***
- In addition, the Department explained in the NPRM that rescission of the 2021 IC Rule would be separate from the new regulations regarding employee and independent contractor status promulgated to replace the 2021 IC Rule: ''That rescission would operate independently of the new content in any new final rule, as the Department intends it to be severable from the substantive proposal for adding a new part 795.''
- The Department further explained that, even if the ''substantive provisions'' (i.e., the new regulations) of a final rule were invalidated, enjoined, or otherwise not put into effect, the Department would not intend that the 2021 IC Rule become operative.
- Instead, in such case, for all of the separate reasons for rescinding the 2021 IC Rule set forth by the Department, the rescission would still take effect, and ''the Department would rely on circuit case law and provide subregulatory guidance for stakeholders through existing documents (such as Fact Sheet #13) and new documents (for example, a Field Assistance Bulletin).''
- As the Department noted, relying on federal appellate case law and sub-regulatory guidance consistent with that case law for determining whether a worker is an employee or independent contractor would accurately reflect the FLSA's text and purpose as interpreted by the courts and offer a standard familiar to most stakeholders. ***[(564) See generally id. at 62233]***

What commenters said avoid the severability provision?

Few commenters addressed severability, and the focus of their comments was more on the severability of the rescission of the 2021 IC Rule from the proposed regulations to replace it than the proposed severability provision at 29 CFR 795.115. Several commenters supported the Department's position that the rescission of the 2021 IC Rule is severable from the proposed regulations to replace it.

"stated that "[b]oth the rescission of the 2021 IC Rule and the newly proposed portion of the [NPRM] are critical to reinstating stability and clarity in the Department's approach to defining an employee." It advocated that the "Department should expressly state that it intends for the rescission of the 2021 IC Rule to be severable from the new portion of the [NPRM]."

Farmworker Justice

"agreed that "the severability clause and DOL's explanation of that clause in the preamble to the NPRM make clear that, in the unlikely event a court were to decide to enjoin some portion of the Final Rule addressing the economic reality test, DOL intends that the rescission of the 2021 IC Rule should still take effect." It described this approach as "cautious" and "prudent" and added that "the severance clause makes clear that DOL intended that the rescission of the 2021 IC Rule stands on its own."

AFL–CIO

"supported "the Department's decision to render rescission of the 2021 IC Rule severable from the substantive proposal for adding further regulatory guidance." It added that the Department was "correct to conclude that, in the unlikely event its substantive proposals are 'invalidated, enjoined, or otherwise not put into effect,' the 2021 IC Rule should still not become operative."

LIUNA

What commenters said avoid the severability provision? [Cont.]

Several other commenters criticized the Department's position that the rescission of the 2021 IC Rule is severable from the proposed regulations to replace it.

"stated that "[t]he rescission of the [2021 IC Rule] and the adoption of the proposed rule should not be severable" and added that the Department's "promise that in the absence of a regulation it would provide sub-regulatory guidance has a hollow ring."

Freedom Foundation

"asserted that the reference to " 'substantive' provisions" in the NPRM's severability discussion were inconsistent with how, "[e]lsewhere" in the NPRM, "the Department present[ed] the Proposed Rule as only 'interpretive guidance.' "

CWI

"described the Department's position as "present[ing] workers and business with a Hobson's Choice: either accept the new regulations, or there will be no regulations at all." It stated that, "[c]onsidering that the Department will not even consider making discrete changes, it does not seem appropriate to require businesses and workers to accept a wholesale re-write or face the risks of having no rule at all."

Raymond James

- Having considered the comments, the Department is finalizing the severability provision in 29 CFR 795.115 as proposed and finalizing its proposal that the rescission of the 2021 IC Rule set forth in this final rule is separate and severable from the new part 795 regulations for determining employee or independent contractor status under the FLSA set forth in this final rule.
- No commenter questioned the well-settled legal principle that one portion of a rule may remain operative if another portion is deemed impermissible as long as the agency would independently adopt the remaining portion and the remaining portion can operate sensibly without the impermissible portion. [1]

1. (565) See, e.g., Carlson v. Postal Regulatory Comm'n, 938 F.3d 337, 351 (D.C. Cir. 2019).

What commenters said avoid the severability provision? [Cont.]

- The Department continues to believe that rescission of the 2021 IC Rule is proper for all of the reasons stated in this final rule, and its intent accordingly is for the rescission to remain operative even if this final rule's regulations replacing the 2021 IC Rule are invalidated for any reason.
- In addition, the Department continues to believe that if any particular provision or application of this final rule is invalidated, the rest should continue in effect and can operate sensibly.
- In such case, case law and the Department's sub-regulatory guidance, as appropriate, would provide a familiar and longstanding standard for businesses and workers.

"assert[ed] that this "has a hollow ring" neglects the multiple forms of sub-regulatory guidance, including fact sheets and field assistance bulletins, that the Department may issue. And there was no "Hobson's Choice" between the proposed rule and "having no rule at all"

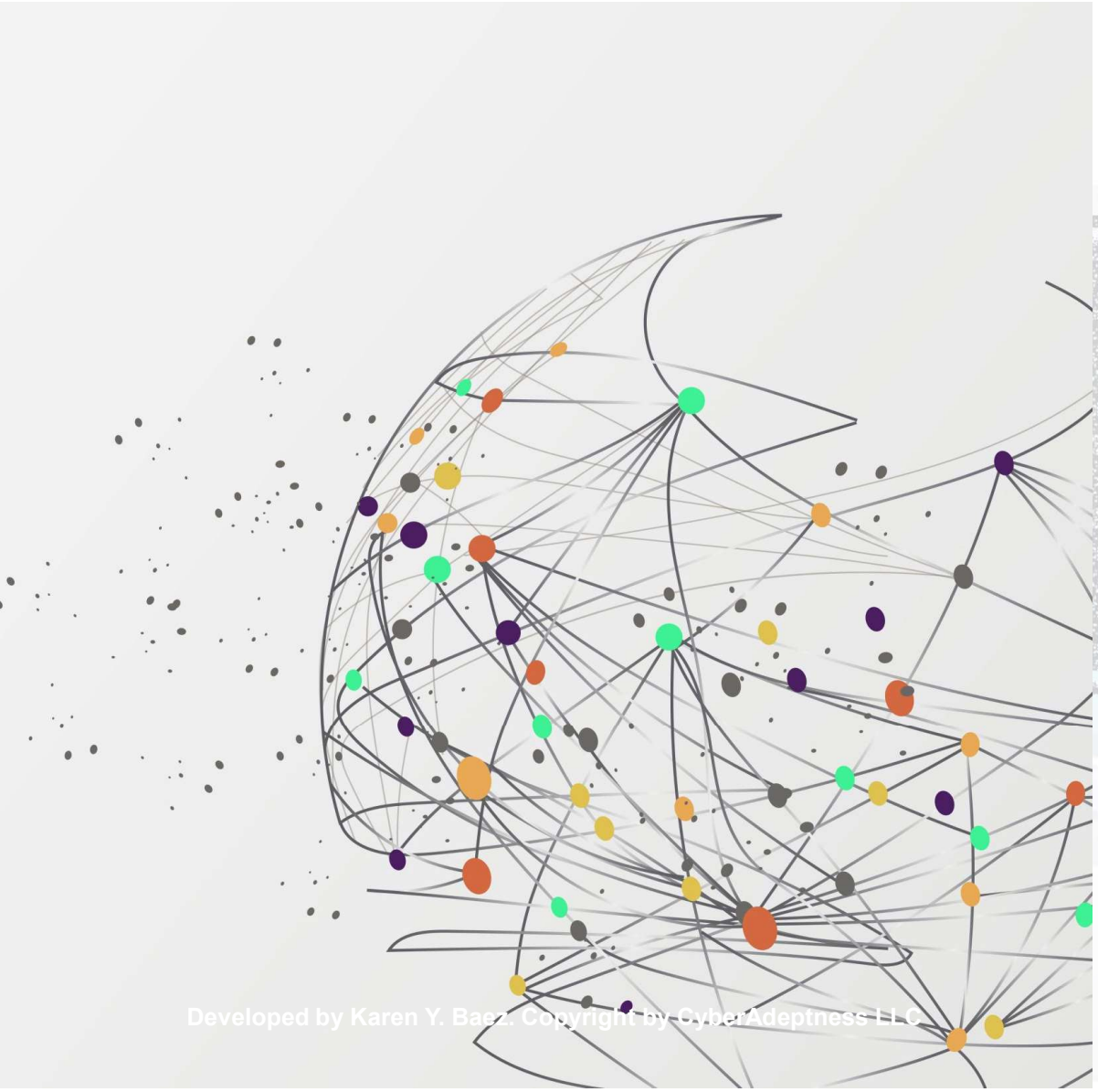
Freedom Foundation

The Department has carefully considered the many comments to the proposed rule and, as reflected in this final rule, has made numerous changes as a result of those comments."

"took the Department's reference to "substantive provisions" out of context.

CWI

The Department's reference to the proposed regulatory provisions as "substantive" was not a characterization of this rulemaking, but an effort to distinguish promulgating the new part 795 regulations from rescinding the 2021 IC Rule.



Amendments to Regulatory Provisions at §§ 780.330(b) and 788.16(a)

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2/27/2024

What industries were impacted by the amendments proposed and what was the outcome?

- Finally, in addition to the proposed regulations at part 795, the Department proposed to amend existing regulatory provisions addressing employee or independent contractor status under the FLSA in particular contexts at 29 CFR 780.330(b) (tenants and sharecroppers) and 29 CFR 788.16(a) (certain forestry and logging workers). [87 FR 62274]
- Specifically, the Department proposed to replace these provisions with cross-references to the guidance provided in part 795.
- The Department did not receive commenter feedback regarding the proposed amendments of these provisions.
- Accordingly, the Department finalizes the amendments to these provisions as proposed.

Forestry and Logging Workers

Tenants and Sharecroppers

Applicable Standards

Overview

VI. Paperwork Reduction Act

- The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 et seq., and its attendant regulations, 5 CFR part 1320, require the Department to consider the agency's need for its information collections, their practical utility, the impact of paperwork and other information collection burdens imposed on the public, and how to minimize those burdens.
- This final rule does not contain a collection of information subject to OMB approval under the PRA.

VII. Executive Order 12866, Regulatory Planning and Review; Executive Order 13563, Improved Regulation and Regulatory Review

What does OMB Executive Orders require from federal agencies?

Under Executive Order 12866, as amended by Executive Order 14094, the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and OMB review.567 Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as a regulatory action that is likely to result in a rule that may:

1. Have an annual effect on the economy of $200 million or more, or adversely affect in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities
2. Create serious inconsistency or otherwise interfere with an action taken or planned by another agency
3. Materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or
4. Raise legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

OIRA has determined that this rule is a *"significant regulatory action"* under section 3(f)(1) of Executive Order 12866.

What does Executive Order 13563 require of agencies?

It requires that it should propose or adopt a regulation ONLY upon a reasoned determination that its benefits justify its costs.

It requires such regulation is tailored to impose the least burden on society, consistent with obtaining the regulatory objectives.

It requires that, in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. ***[(568) See 76 FR 3821 (Jan. 21, 2011)]***

HOWEVER, the Executive Order also recognizes that ….

Some costs and benefits are difficult to quantify and provides that, when appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

The analysis [in the next slides] outlines the impacts that the Department anticipates may result from this rule and was prepared pursuant to the above mentioned executive orders.

Introduction

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What is being addressed in this rule?

- In this rule, the Department is rescinding and replacing regulations addressing the classification of workers as employees or independent contractors under the Fair Labor Standards Act (FLSA or Act) to be more consistent with judicial precedent and the Act's text and purpose as interpreted by the courts.
- For decades, the Department and courts have applied an economic reality test to determine whether a worker is an employee or an independent contractor under the FLSA.
- The ultimate inquiry is whether, as a matter of economic reality, the worker is economically dependent on the employer for work (and is thus an employee) or is in business for themself (and is thus an independent contractor).
- To answer this ultimate inquiry of economic dependence, the courts and the Department have historically conducted a multifactor totality-of-the-circumstances analysis, considering multiple factors with no factor or factors being dispositive to determine whether a worker is an employee or an independent contractor under the FLSA.
- In January 2021, the Department published a rule titled "Independent Contractor Status Under the Fair Labor Standards Act" (2021 IC Rule) that provided guidance on the classification of independent contractors under the FLSA. [See 86 FR 1168]
- As explained in sections III, IV, and V above, the Department believes that the 2021 IC Rule did not fully comport with the FLSA's text and purpose as interpreted by the courts and, had it been left in place, would have had a confusing and disruptive effect on workers and businesses alike due to its departure from decades of case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test.

What is being addressed in this rule? [Cont.]

- The 2021 IC Rule included provisions that were in tension with this longstanding case law—such as designating two factors as most probative and predetermining that they carry greater weight in the analysis, considering investment and initiative only in the opportunity for profit or loss factor, and excluding consideration of whether the work performed is central or important to the employer's business.
- These and other provisions in the 2021 IC Rule narrowed the application of the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for themself.
- The Department believes that retaining the 2021 IC Rule would have had a confusing and disruptive effect on workers and businesses alike due to its departure from case law describing and applying the multifactor economic reality test as a totality-of-the-circumstances test.
- Departing from the longstanding test applied by the courts also increases the risk of misapplication of the economic reality test, which the Department believes could result in the increased misclassification of workers as independent contractors.
- Therefore, the Department is rescinding the 2021 IC Rule and replacing it with an analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule.
- Of particular note, the regulations set forth in this final rule do not use "core factors" and instead return to a totality-of-the-circumstances analysis of the economic reality test in which the factors do not have a predetermined weight and are considered in view of the economic reality of the whole activity.
- Regarding the economic reality factors, this final rule returns to the longstanding framing of investment as its own separate factor, and integral as an integral part of the potential employer's business rather than an integrated unit of production.

What is being addressed in this rule? [Cont.]

- The final rule also provides broader discussion of how scheduling, remote supervision, price setting, and the ability to work for others should be considered under the control factor, and it allows for consideration of reserved rights to control while removing the provision in the 2021 IC Rule that minimized the relevance of retained rights.
- Further, the final rule discusses exclusivity in the context of the permanency factor, and initiative in the context of the skill factor.
- The Department also made several adjustments to the proposed regulations after consideration of the comments received, including revisions to the regulations regarding the investment factor and the control factor (specifically addressing compliance with legal obligations).
- The Department believes this rule is more grounded in the ultimate inquiry of whether a worker is in business for themself or is economically dependent on the employer for work.
- Workers, employers, and independent businesses should benefit from affirmative regulatory guidance from the Department further developing the concept of economic dependence and how each economic reality factor is probative of whether the worker is economically dependent on the employer for work or is in business for themself.
- When evaluating the economic impact of this rule, the Department has considered the appropriate baseline with which to compare changes.
- As discussed in section II.C.3., on March 14, 2022, in a lawsuit challenging the Department's delay and withdrawal of the 2021 IC Rule, a federal district court in the Eastern District of Texas issued a decision vacating the delay and withdrawal of the 2021 IC Rule and concluded that the 2021 IC Rule became effective on March 8, 2021.***[(570) See CWI v. Walsh, 2022 WL 1073346.]***

What's the status of the 2021 IC Rule?

2021
IC RULE

- Because the 2021 IC Rule is in effect according to the district court until this final rule takes effect and would continue to be in effect in the absence of this rule, the Department believes that the 2021 IC Rule is the proper baseline to compare against when estimating the economic impact of this rule. [1]
- Compared to the 2021 IC Rule, the Department anticipates that this rule may reduce misclassification of employees as independent contractors, because this rule is more consistent with existing judicial precedent and the Department's longstanding guidance.
- The 2021 IC Rule's elevation of certain factors, devaluation of other factors, and its preclusion of consideration of relevant facts under several factors could result in misapplication of the economic reality test and may have conveyed to employers that it might be easier than it was prior to the 2021 IC Rule to classify workers as independent contractors rather than FLSA-covered employees.
- As discussed in section III.B., the Department received comments indicating confusion about how to apply the analysis in the 2021 IC Rule, which could lead to misclassification of workers as independent contractors.
- The issuance of this rule could reduce or prevent this type of misclassification from occurring.

1. (571) OMB Circular A–4 notes that when agencies are developing a baseline, "[it] should be the best assessment of the way the world would look absent the proposed action."

How did the department delineated the analysis without proper data on the number of misclassified workers?

- Because the Department does not have data on the number of misclassified workers and because there are inherent challenges in determining the extent to which the rule would reduce this misclassification, much of the analysis is presented qualitatively, aside from rule familiarization costs, which are quantified.[1]
- The Department has therefore provided a qualitative analysis of the effects (transfers and benefits) that could occur because of this reduced misclassification.
- As discussed above, the 2021 IC Rule is the appropriate baseline to represent what the world could look like going forward in the absence of this rule.
- However, this baseline may not fully reflect what the world would look like absent this rule.
- Until March 2022, the Department had not been using the framework for analysis from the 2021 IC Rule when assessing independent contractor status in its enforcement and compliance assistance activities because the Department had published final rules delaying the effective date of, and subsequently withdrawing, the 2021 IC Rule. (As described in section II.C., a federal district court in March 2022 vacated the Department's Delay and Withdrawal Rules and ruled that the 2021 IC Rule had taken effect in March 2021.)
- Further, as explained earlier in section III.B., the Department is not aware of any federal district or appellate court that has endorsed the 2021 IC Rule's analysis in the course of resolving a dispute regarding the proper classification of a worker as an employee or independent contractor.

1. (572) The Department uses the term ''misclassification'' throughout this analysis to refer to workers who have been classified as independent contractors but who, as a matter of economic reality, are economically dependent on their employer for work. These workers' legal status would not change under the 2021 IC Rule or this rule—they would properly be classified as employees under both rules. The Department notes that sources cited in this analysis may use other misclassification standards which may not align fully with the Department's use of the term.

What did the department used to compare this final rule to the current economic and legal landscape?

- Therefore, if the Department were to instead compare this final rule to the current economic and legal landscape that continues to reflect the courts' longstanding multifactor economic reality test, the economic impact would be much smaller, because this rule is consistent with that landscape (i.e., the longstanding judicial precedent and guidance that the Department was relying on prior to March of 2022).
- The Coalition to Promote Independent Entrepreneurs agreed that the 2021 IC Rule is the correct baseline to analyze the recission of the rule, but not the separate issue of issuing new regulations "containing a new interpretation of the multifactor economic reality test."
- This commenter appeared to disagree with the Department's explanation that "under the current economic and legal landscape baseline, the economic impact of DOL's proposed new iteration of the test might, or might not, be 'much smaller.' "
- It asserted that the direction of this economic impact would be negative, because the rule would lead to increased uncertainty and confusion and would create an adverse economic impact by "denying individuals their right to be recognized as independent contractors under the FLSA."
- The Department addresses claims from this commenter and others on the potential costs and benefits of this rule throughout this economic analysis.

The current economic and legal landscape that reflects the courts longstanding multifactor economic reality test.

Will this new rule result in a widespread reclassification of workers?

- The Department does not believe, as reflected in this analysis, that this rule will result in widespread reclassification of workers.
- That is, for workers who are properly classified as independent contractors, the Department does not, for the most part, anticipate that the guidance provided in this rule will result in these workers being reclassified as employees.
- Especially compared to the guidance that was in effect before the 2021 IC Rule, the test put forth in this rule would not make independent contractor status significantly less likely.
- Rather, impacts resulting from this rule will mainly be due to a reduction in misclassification.
- If the 2021 IC Rule had been retained, the risk of misclassification could have increased.
- As noted previously in section III, the 2021 IC Rule's elevation of certain factors and its preclusion of consideration of relevant facts under several factors, which is a departure from judicial precedent applying the economic reality test, could result in misapplication of the economic reality test and may have conveyed to employers that it might be easier than it was prior to the 2021 IC Rule to classify certain workers as independent contractors rather than FLSA-covered employees.
- This rule could therefore help prevent this misclassification by providing employers with guidance that is more consistent with longstanding precedent.

What did commenters opposing the proposed rule said?

Many commenters who wrote in opposition to the proposed rule were concerned that, because of this rule, many independent contractors would be reclassified as employees, and that there would be a large negative impact associated with this reclassification.

"DOL implicitly assumes that 100 percent of potential contracting jobs will be turned into employment jobs; this assumption is extremely optimistic and downplays very significant consequences in connection with the rule in question."

[senior research fellow] at the Mercatus Center

The Department believes that concerns about widespread reclassification are not realistic because the Department is adopting guidance in this rule that is essentially identical to the standard it applied for decades prior to the 2021 IC Rule, derived from the same analysis that courts have applied for decades and have been continuing to apply since the 2021 IC Rule took effect.

"stated that the practical result of the Proposed Rule would be that many workers will be reclassified as employees, including those who want to be independent contractors."

Cambridge Investment Research Inc.

However, the proposed rule explicitly noted that the Department does not expect any widespread reclassification of independent contractors as employees, and at no point assumed that 100 percent of contracting jobs would be turned into employment jobs.

The Department received multiple comments discussing the negative impacts of widespread reclassification and citing research about potential job losses and loss of earnings.

"[A] study published last April concluded that widespread reclassification would destroy as many as 769,000 work opportunities and wipe out $9.1 billion in earnings.[1] **The proposed rule fails to take these effects into account."**

Littler's Workplace Policy Institute

1. (573) "New Study Finds Millions Could Lose Work if U.S. Reclassifies Contractors," April 6, 2022. https://progresschamber.org/new-study-findsmillions-could-lose-work-if-u-s-reclassifiescontractors/.

Is the Departments economic reality test the ABC Test used by some State and Federal Agencies?

NO. The economic analysis test is unrelated to the ABC Test leveraged by state or federal agencies to determine worker classification. The department has NO INTENTION on applying the ABC test as part of the guidelines.

TEST

- The Chamber of Progress cites this same study, noting that, *"A national rule reclassifying independent contractors as employees could result in approximately 4.4 million people being involuntarily reclassified[.]"*
- However, the study that these data points come from is an analysis of the potential impacts of a nationwide ABC test.
- The Chamber of Progress release about the report states, *"Specifically, the study examines the 'ABC Test,' which is used in a variety of state and federal proposals to determine whether a worker is an employee or an independent contractor."*
- The Department believes that the reclassification effects raised by these commenters cannot be applied to this rule, because the Department's economic reality test is not the ABC test.
- While the Department responds throughout this economic analysis to comments about the potential negative impacts of the rule from those who are in opposition, it is important to note that any reclassification or job loss estimates associated with a nationwide ABC test are not appropriate to apply to this rule because this rule does not adopt an ABC test and are therefore not included in the Department's estimated impacts.

Estimated Number of Independent Contractors

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What steps did the department take to estimate the prevalence of independent contracting?

- To provide some context on the prevalence of independent contracting, the Department first estimated the number of independent contractors.
- There are a variety of estimates of the number of independent contractors spanning a wide range depending on methodologies and how the population is defined. [1]
- There is no data source on independent contractors that perfectly mirrors the definition of independent contractor in the Department's regulations.
- There is also no regularly published data source on the number of independent contractors and data from the current year does not exist, making it difficult to examine trends in independent contracting or to measure how regulatory changes impact the number of independent contractors.
- The Department believes that the Current Population Survey (CPS) Contingent Worker Supplement (CWS) offers an appropriate lower bound for the number of independent contractors; however, there are potential biases in these data that will be noted.
- This was the estimation method used in the 2021 IC Rule and the proposed rule, and the Department has not found any new data or analyses to indicate a need for any changes.
- Some recent data sources provide an indication of how COVID–19 may have impacted the number of independent contractors, but this is inconclusive.
- Additionally, estimates from other sources will be presented to demonstrate the potential range.

1. (574) The Department uses the term ''independent contractor'' throughout this analysis to refer to workers who, as a matter of economic reality, are not economically dependent on their employer for work and are in business for themselves. The Department notes that sources cited in this analysis may use other definitions of independent contractors that may not align fully with the Department's use of the term.

What data did the department used from the U.S. Census Bureau?

https://www.census.gov/programs-surveys/cps.html

- The U.S. Census Bureau conducts the CPS, and it is published monthly by the Bureau of Labor Statistics (BLS).
- The sample includes approximately 60,000 households and is nationally representative.
- Periodically since 1995, and most recently in 2017, the CPS included a supplement to the May survey to collect data on contingent and alternative employment arrangements.
- Based on the CWS, there were 10.6 million independent contractors in 2017, amounting to 6.9 percent of workers. [1]
- The CWS measures those who say that their independent contractor job is their primary job and that they worked at the independent contractor job in the survey's reference week.

1. (575) Bureau of Labor Statistics, "Contingent and Alternative Employment Arrangements—May 2017," USDL–18–0942 (June 7, 2018), https://www.bls.gov/news.release/pdf/conemp.pdf.

What is BLS's process to identify Independent Contractors?

- The BLS's estimate of independent contractors includes "[w]orkers who are identified as independent contractors, independent consultants, or freelance workers, regardless of whether they are self-employed or wage and salary workers."
- BLS asks two questions to identify independent contractors: [1]
    - Workers reporting that they are self-employed are asked:
        - "Are you self-employed as an independent contractor, independent consultant, freelance worker, or something else (such as a shop or restaurant owner)?" (9.0 million independent contractors). We refer to these workers as "self-employed independent contractors" in the remainder of the analysis.
    - Workers reporting that they are wage and salary workers are asked:
        - "Last week, were you working as an independent contractor, an independent consultant, or a freelance worker? That is, someone who obtains customers on their own to provide a product or service." (1.6 million independent contractors). We refer to these workers as "other independent contractors" in the remainder of the analysis.
    - It is important to note that independent contractors are identified in the CWS in the context of the respondent's "main" job (i.e., the job with the most hours). [2]

1. (576) The variables used are PES8IC=1 for self-employed and PES7=1 for other worker
2. (577) While self-employed independent contractors are identified by the worker's main job, other independent contractors answered yes to the CWS question about working as an independent contractor last week. Although the survey question does not ask explicitly about the respondent's main job, it follows questions asked about the respondent's main job.

Which Independent contractors are not included in the analysis?

- Therefore, the estimate of independent contractors does not include those who may be an employee for their primary job, but may also work as an independent contractor. [1]
- For example, Lim et al. (2019) estimate that independent contracting work is the primary source of income for 48 percent of independent contractors.[2]
- Applying this estimate to the 10.6 million independent contractors estimated from the CWS, results in 22.1 million independent contractors (10.6 million ÷ 0.48).
- Alternatively, a survey of independent contractors in Washington found that 68 percent of respondents reported that independent contract work was their primary source of income. [3]

1. (578) Even among independent contractors, failure to report multiple jobs in response to survey questions is common. For example, Katz and Krueger (2019) asked Amazon Mechanical Turk participants the CPS-style question "Last week did you have more than one job or business, including part time, evening, or weekend work?" In total, 39 percent of respondents responded affirmatively. However, these participants were asked the followup question "Did you work on any gigs, HITs or other small paid jobs last week that you did not include in your response to the previous question?" After this question, which differs from the CPS, 61 percent of those who indicated that they did not hold multiple jobs on the CPS-style question acknowledged that they failed to report other work in the previous week. As Katz and Krueger write, "If these workers are added to the multiple job holders, the percent of workers who are multiple job holders would almost double from 39 percent to 77 percent." See L. Katz and A. Krueger, "Understanding Trends in Alternative Work Arrangements in the United States," RSF: The Russell Sage Foundation Journal of the Social Sciences 5(5), p. 132–46 (2019).
2. (579) K. Lim, A. Miller, M. Risch, and E. Wilking, "Independent Contractors in the U.S.: New Trends from 15 years of Administrative Tax Data," Department of Treasury, p. 61 (Jul. 2019), https:// www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf. From table 5, the total number of independent contractors across all categories is 13.81 million. The number of independent contractors in the categories where these workers earn the majority of their labor income from independent contractor earnings is 6.63 million. 6.63 million ÷ 13.81 million = 0.48.
3. (580) Washington Department of Commerce, "Independent Contractor Study," p. 21 (Jul. 2019), https://deptofcommerce.app.box.com/v/independent-contractor-study.

What potential bias was identified on the data sources reviewed?

- However, because this survey only includes independent contractors in one state, the Department has not used this data to adjust its estimate of independent contractors.
- The CWS's large sample size results in small sampling error.
- However, the questionnaire's design may result in some non-sampling error.
- For example, one potential source of bias is that the CWS only considers independent contractors during a single point in time—the survey week (generally the week prior to the interview).
- These numbers will thus underestimate the prevalence of independent contracting over a longer timeframe, which may better capture the size of the population. [1]
- For example, Farrell and Greig (2016) used a randomized sample of 1 million Chase customers to estimate prevalence of the Online Platform Economy. [2]

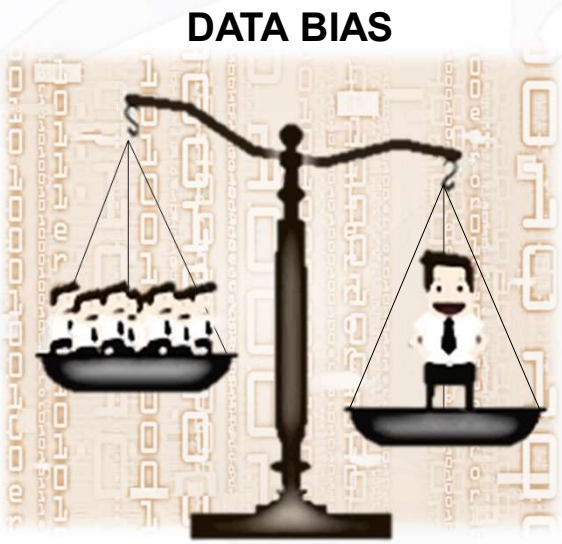
1. (581) In any given week, the total number of independent contractors would have been roughly the same, but the identity of the individuals who do it for less than the full year would likely vary. Thus, the number of unique individuals who work at some point in a year as independent contractors would exceed the number of independent contractors who work within any 1-week period as independent contractors.
2. (582) D. Farrell and F. Greig, "Paychecks, Paydays, and the Online Platform," JPMorgan Chase Institute (2016), https://papers.ssrn.com/sol3/ papers.cfm?abstract_id=2911293. The authors define the Online Platform Economy as "economic activities involving online intermediaries." This includes "labor platforms" that "connect customers with freelance or contingent workers" and "capital platforms" that "connect customers with individuals who rent assets or sell goods peer-topeer." As such, this study encompasses data on income sources that the Department acknowledges might not be a one-to-one match with independent contracting and could also include work that is part of an employment relationship. However, the Department believes that including data on income earned through online platforms is useful when discussing the potential magnitude of independent contracting.

What potential bias was identified on the data sources reviewed? [Cont.]

- They found that "[a]lthough 1 percent of adults earned income from the Online Platform Economy in a given month, more than 4 percent participated over the three-year period."
- Additionally, Collins et al. (2019) examined tax data from 2000 through 2016 and found that the number of workers who filed a form 1099 grew substantially over that period, and that fewer than half of these workers earned more than $2,500 from 1099 work in 2016.
- The prevalence of lower annual earnings implies that most workers who received a 1099 did not work as an independent contractor every week. [1]
- The CWS also uses proxy responses, which may underestimate the number of independent contractors.
- The RAND American Life Panel (ALP) survey conducted a supplement in 2015 to mimic the CWS questionnaire but used self-responses only.
- The results of the survey were summarized by Katz and Krueger (2018).[2]
- This survey found that independent contractors comprise 7.2 percent of workers.
- Katz and Krueger identified that the 0.5 percentage point difference in magnitude between the CWS and the ALP was due to both cyclical conditions, and the lack of proxy responses in the ALP. [3]

1. (583) B. Collins, A. Garin, E. Jackson, D. Koustas, and M. Payne, "Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns," IRS SOI Joint Statistical Research Program (2019) (unpublished paper), https:// www.irs.gov/pub/irs-soi/19rpgigworkreplacing traditionalemployment.pdf.
2. (584) See L. Katz and A. Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015," (2018).
3. (585) Id. at 49. The estimate is 9.6 percent without correcting for overrepresentation of self-employed workers or multiple job holders. Id. at 31.

What potential bias was identified on the data sources reviewed? [Cont.]



- Therefore, the Department believes a reasonable upperbound on the potential bias due to the use of proxy responses in the CWS is 0.5 percentage points (7.2 versus 6.7). [1] [2]
- Another potential source of bias in the CWS is that some respondents may not self-identify as independent contractors.
- For example, Abraham et al. (2020) estimated that 6.6 percent of workers in their study initially responded that they are employees but were then determined (by the researcher) to be independent contractors based on their answers to follow-up questions.[3]

1. (587) Note that they estimate 6.7 percent of employed workers are independent contractors using the CWS, as opposed to 6.9 percent as estimated by the BLS. This difference is attributable to changes to the sample to create consistency.
2. (588) In addition to the use of proxy responses, this difference is also due to cyclical conditions. The impacts of these two are not disaggregated for independent contractors, but if we applied the relative sizes reported for all alternative work arrangements, we would get 0.36 percentage point difference due to proxy responses. Additionally, this may not entirely be a bias. It stems from differences in independent contracting reported by proxy respondents and actual respondents. As Katz and Krueger explain, this difference may be due to a ‘‘mode’’ bias or proxy respondents may be less likely to be independent contractors. Id. at Addendum p. 4.
3. (589) K. Abraham, B. Hershbein, and S. Houseman, ‘‘Contract Work at Older Ages,’’ NBER Working Paper 26612 (2020), http://www.nber.org/papers/ w26612

What potential bias was identified on the data sources reviewed? [Cont.]

- Additionally, individuals who do what some researchers refer to as "informal work" may in fact be independent contractors though they may not characterize themselves as such. [1] This population could be substantial.
- Abraham and Houseman (2019) confirmed this in their examination of the Survey of Household Economics and Decision-making. They found that 28 percent of respondents reported doing "informal work" for money over the past month.[2]
- Conversely, another source of bias in the CWS is that some workers who selfidentify as independent contractors may misunderstand their status or may be misclassified by their employer. These workers may answer the survey in the affirmative, despite not truly being independent contractors.

Self-Identification as Independent Contractors is not always indicative of such

1. The Department believes that including data on what is referred to in some studies as "informal work" is useful when discussing the magnitude of independent contracting, although not all informal work is done by independent contractors. The Survey of Household Economics and Decisionmaking asked respondents whether they engaged in informal work sometime in the prior month. It categorized informal work into three broad categories: personal services, on-line activities, and off-line sales and other activities, which is broader than the scope of independent contractors. These categories include activities like house sitting, selling goods online through sites like eBay or craigslist, or selling goods at a garage sale. The Department acknowledges that the data discussed in this study might not be a one-to-one match with independent contracting and could also include work that is part of an employment relationship, but it nonetheless provides some useful data for this purpose.
2. K. Abraham, and S. Houseman, "Making Ends Meet: The Role of Informal Work in Supplementing Americans' Income," RSF: The Russell Sage Foundation Journal of the Social Sciences 5(5): 110–31 (2019), https://www.jstor.org/stable/ 10.7758/rsf.2019.5.5.06.

What potential bias was identified on the data sources reviewed? [Cont.]

- While precise and representative estimates of nationwide misclassification are unavailable, multiple studies suggest its prevalence in numerous sectors in the economy. [1]
- See section VII.D.2. for a more thorough discussion of the prevalence of misclassification.
- Because reliable data on the potential magnitude of the biases discussed above are unavailable, and so the net direction of the biases is unknown, the Department has not attempted to calculate how these biases may impact the estimated number of independent contractors.
- As noted above, integrating the estimated proportions of workers who are independent contractors on secondary or otherwise excluded jobs produces an estimate population of 22.1 million, representing the total number of workers working as independent contractors in any job at a given time.
- Given the prevalence of independent contractors who work sporadically and earn minimal income, adjusting the estimate according to these sources captures some of this population. It is likely that this figure is still an underestimate of the true independent contractor pool.
- This is because, in part, the CWS estimate represents only the number of workers who worked as independent contractors on their primary job during the survey reference week, which is why the Department applied the research literature and adjusted this measure to include workers who are independent contractors in a secondary job or who were excluded from the CWS estimate due to other factors.

1. (592) See, e.g., U.S. Gov't Accountability Off., GAO– 09–717, Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention 10 (2008) ("Although the national extent of employee misclassification is unknown, earlier national studies and more recent, though not comprehensive, studies suggest that employee misclassification could be a significant problem with adverse consequences.").

Range of Estimates in the Literature

Overview pg. 92

What kind of review the department conducted to determine the estimated count of Independent Consultants?

A LITERATURE REVIEW

Which is a **comprehensive review and analysis of the published literature on a specific topic or research question**. The literature that is reviewed contains: books, articles, academic articles, conference proceedings, association papers, and dissertations.

- To further consider the range of estimates available, the Department conducted a literature review, the findings of which are presented in Table 1. [See next slide]
- Other studies were also considered but are excluded from this table because the study populations were broader than just independent contractors, limited to one state, or include workers outside of the United States. [1]

1. (593) Including, but not limited to: McKinsey Global Institute, "Independent Work: Choice, Necessity, and the Gig Economy" (2016),https:// www.mckinsey.com/featured-insights/employmentand-growth/independent-work-choice-necessityand-the-gig-economy; Kelly Services, "Agents of Change" (2015), https://www.kellyservices.com/ global/siteassets/3-kelly-global-services/ uploadedfiles/3-kelly_global_services/content/ sectionless_pages/kocg1047720freeagent20 whitepaper20210x21020final2.pdf; Robles and McGee, "Exploring Online and Offline Informal Work: Findings from the Enterprising and Informal Work Activities (EIWA) Survey" (2016); Upwork, "Freelancing in America" (2019); Washington Department of Commerce, "Independent Contractor Study," (Jul. 2019), https://deptofcommerce.app. box.com/v/independent-contractor-study; D. Farrell and F. Greig, "Paychecks, Paydays, and the Online Platform," JPMorgan Chase Institute (2016), https:// papers.ssrn.com/sol3/papers.cfm?abstract_ id=2911293; MBO Partners, "State of Independence in America" (2016); Abraham et al., "Measuring the Gig Economy: Current Knowledge and Open Issues" (2018), https://www.nber.org/papers/w24950; B. Collins, A. Garin, E. Jackson, D. Koustas, and M. Payne, "Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns," IRS SOI Joint Statistical Research Program (2019) (unpublished paper), https:// www.irs.gov/pub/irs-soi/19rpgigworkreplacing traditionalemployment.pdf; Gitis et al., "The Gig Economy: Research and Policy Implications of Regional, Economic, and Demographic Trends," American Action Forum (2017), https://www. americanactionforum.org/research/gig-economyresearch-policy-implications-regional-economicdemographic-trends/#ixzz5lpbJp79a; Dourado and Koopman, "Evaluating the Growth of the 1099 Workforce," Mercatus Center (2015), https://www. mercatus.org/publication/evaluating-growth-1099- workforce.

Table 1 – Summary of Estimates of Independent Contracting

TABLE 1—SUMMARY OF ESTIMATES OF INDEPENDENT CONTRACTING

Source	Method [a]	Definition [b]	Percent of workers	Sample size	Year
CPS CWS	Survey	Independent contractor, consultant or freelance worker (main only).	6.9	50,392	2017
ALP	Survey	Independent contractor, consultant or freelance worker (main only).	7.2	6,028	2015
Gallup	Survey	Independent contractor	14.7	5,025	2017
GSS QWL	Survey	Independent contractor, consultant or freelancer (main only)	14.1	2,538	2014
Jackson et al	Tax data	Independent contractor, household worker	[c] 6.1	~5.9 million [d]	2014
Lim et al	Tax data	Independent contractor	8.1	1% of 1099–MISC and 5% of 1099–K.	2016

[a] The CPS CWS and the GSS QWL are nationally representative, and the ALP CWS is approximately nationally representative. The Gallup poll is demographically representative but does not explicitly claim to be nationally representative. Lastly, the two tax data sets are very large random samples and consequently are likely to be nationally representative, although the authors do not explicitly claim so.

[b] The survey data only identify independent contractors on their main job. Jackson et al. include independent contractors as long as at least 15 percent of their earnings were from self-employment income; thus, this population is broader. If Jackson et al.'s estimate is adjusted to exclude those who are primary wage earners, the rate is 4.0 percent. Lim et al. include independent contractors on all jobs. If Lim et al.'s estimate is adjusted to only those who receive a majority of their labor income from independent contracting, the rate is 3.9 percent.

[c] Summation of (1) 2,132,800 filers with earnings from both wages and sole proprietorships and expenses less than $5,000, (2) 4,125,200 primarily sole proprietorships and with less than $5,000 in expenses, and (3) 3,416,300 primarily wage earners.

[d] Estimate based on a 10 percent sample of self-employed workers and a 1 percent sample of W–2 recipients.

- The RAND ALP, [1] the Gallup Survey, [2] and the General Social Survey's (GSS's) Quality of Worklife (QWL) [3] supplement are widely cited alternative estimates. However, the Department chose to use sources with significantly larger sample sizes and/or more recent data for the primary estimate.

1. (594) See L. Katz and A. Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015," (2018).
2. (595) "Gallup's Perspective on The Gig Economy and Alternative Work Arrangements," Gallup (2018), https://www.gallup.com/workplace/240878/ gig-economy-paper-2018.aspx.
3. (596) See Abraham et al., "Measuring the Gig Economy: Current Knowledge and Open Issues"

What advantages does using Tax data have on identifying independent contractors?

The use of Tax Data is advantageous because …

- It includes large sample sizes
- It provides the ability to link information reported on different records
- It provides reduction in certain biases such as reporting bias
- It provides records of ALL activity throughout the calendar year (the CWS only references one week_
- It includes both primary and secondary independent contractors.

- Jackson et al. (2017) [1] and Lim et al. (2019) [2] use tax information to estimate the prevalence of independent contracting. In general, studies using tax data tend to show an increase in prevalence of independent contracting over time. The use of tax data has some advantages and disadvantages over survey data.

1. (597) E. Jackson, A. Looney, and S. Ramnath, "The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage," OTA Working Paper 114 (2017), https:// www.treasury.gov/resource-center/tax-policy/taxanalysis/Documents/WP-114.pdf.
2. (598) K. Lim, A. Miller, M. Risch, and E. Wilking, "Independent Contractors in the U.S.: New Trends from 15 years of Administrative Tax Data," Department of Treasury, p. 61 (Jul. 2019), https:// www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf.

What disadvantages does using Tax data have on identifying independent contractors?

The use of Tax Data is disadvantageous because …

- The independent contractor status needs to be inferred; as there is likely an underreporting bias (i.e., some workers do not file taxes).
- Researchers are generally trying to match the IRS definition of Independent contractor, which does not mirror the scope of independence under FLSA.
- The estimates include misclassified independent contractors. [1]
- It includes both primary and secondary independent contractors.

- **A major disadvantage of using tax data for this analysis is that the detailed source data are not publicly available and thus the analyses cannot be directly verified or adjusted as necessary (e.g., to describe characteristics of independent contractors, etc.).**

1. (599) In comparison to household survey data, tax data may reduce certain types of biases (such as recall bias) while increasing other types (such as underreporting bias). Because the Department is unable to quantify this tradeoff, it could not determine whether, on balance, survey or tax data are more reliable.

COVID-19 Adjustment to the Estimated Number of Independent Contractors

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What's the departments estimated number of Independent Contractors?

The Department's estimate of the number of independent contractors, 22.1 million, is based primarily on 2017 data. Because COVID–19 has had a substantial impact on the labor market, it is possible that this estimate is not currently appropriate. The Department conducted a search for more recent data to indicate any trends in the number of independent contractors since 2017. The findings are inconclusive but generally do not indicate an increase.

- The Federal Reserve Board's annual Survey of Household Economics and Decision making (SHED) provides measures of the economic well-being of U.S. households.
- The Federal Reserve Board publishes a report *"Economic Well-Being of U.S. Households"* summarizing the findings of each survey. [1]
- One subsection of the Employment section describes the results of the questions related to "The Gig Economy."
- While the survey questions about work in the "gig economy" include more types of work scenarios than just independent contracting, a decrease from 30 percent to 20 percent of adults answering "yes" from 2017 to 2020 may indicate that the number of independent contractors in this industry also decreased during that time period. [2]
- The report summarizing the 2021 data is available, but unfortunately the gig economy questions were revised substantially, so a comparable value is not available for 2021.
- Moreover, trends of potential independent contractors in one industry are not necessarily indicative of trends across the economy.

1. (600) Consumer and Community Research Section of the Federal Reserve Board's Division of Consumer and Community Affairs, "Economic Well-Being of U.S. Households in 2021," Board of Governors of the Federal Reserve System (2022). Reports from all years available at https://www. federalreserve.gov/publications/report-economicwell-being-us-households.htm.
2. (601) The report defines gig work as including "three types of non-traditional activities: offline service activities, such as child care or house cleaning; offline sales, such as selling items at flea markets or thrift stores; and online services or sales, such as driving using a ride-sharing app or selling items online." Consumer and Community Research Section of the Federal Reserve Board's Division of Consumer and Community Affairs, "Economic Well-Being of U.S. Households in 2017," Board of Governors of the Federal Reserve System (May 2018).

What report offered by MBO partners did the department reviewed?

https://www.mbopartners.com/state-of-independence/

- MBO Partners, a company with the goal of connecting enterprise organizations and top independent professionals, also conducts an annual survey and prepares a research report of the findings. [1]
- In all groups of "independent workers," MBO Partners similarly found a decrease in the number from 2017 to 2020.
- Conversely, in total, the 2021 report shows a large increase from 2020, enough that the number of independent workers in 2021 is larger than the 2017 number.
- However, this increase occurs only in the "occasional independent" workers category, described as those who work part-time and regularly, but without set hours.
- Comparing the number of parttime and full-time independent workers yields similar values in 2017 and 2021, so the Department believes that no adjustments are needed to the 2017 estimate of 22.1 million independent contractors.

1. (602) MBO partners, "The Great Realization: 11th Annual State of Independence," (2021). Annual reports are available at https://www.mbopartners. com/state-of-independence/previous-reports/.

What's the departments stance on upwork's Freelancers Study?

A few commenters said that the Department underestimated the number of independent contractors in the U.S. because the estimate is based on outdated data.

"referenced a more recent study from Upwork, which found that "59 million workers performed freelance work in the past 12 months, representing 36%— or more than one-third—of the entire U.S. workforce." [1 (603)]

Coalition for Workforce Innovation

1. (603) "Upwork Study Finds 59 Million Americans Freelancing Amid Turbulent Labor Market," Upwork, December 8, 2021. https://www.upwork.com/press/releases/upwork-study-finds-59-millionamericans-freelancing-amid-turbulent-labormarket. Full study available at https://www.upwork.com/research/freelance-forward-2021.

- As discussed above, the Department acknowledges that its estimate of independent contractors could be an underestimate.
- However, the estimates presented in the Upwork study could be an overestimate because their definition of "freelancer" likely also includes some workers who would be classified as employees under the FLSA in addition to those who would be classified as independent contractors. [1]
- Furthermore, the Department was unable to verify whether their sample of 6,000 workers was representative of all workers in the U.S.
- While the Department appreciates this additional context on the potential scope of independent contracting in the U.S., the estimate of independent contractors in this analysis has not been revised.

1. (604) Their report defines freelancers as "[i]ndividuals who have engaged in supplemental, temporary, project- or contract-based work, within the past 12 months." While many of these workers could be independent contractors, some workers engaged in supplemental or temporary work could likely be considered employees.

Demographics of Independent Contractors

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What demographic information was attained from CWS?

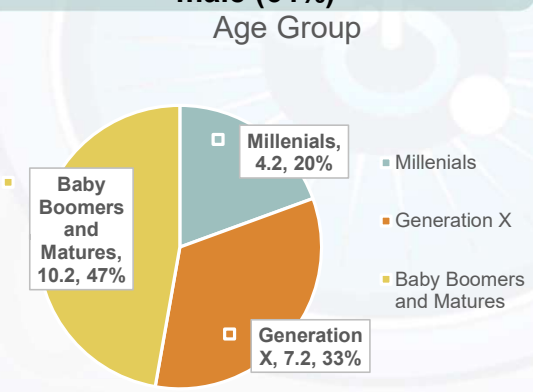
The Department reviewed demographic information on independent contractors using the CWS, which, as [previously stated], only measures those who say that their independent contractor job is their primary job and that they worked at the independent contractor job in the survey's reference week.

According to CWS, the primary Independent Contractors were most prevalent in the following industries.

Construction Workers

professional and business services industries

Data showed that Contractors tend to be OLDER and predominately male (64%)



- Millennials (defined as those born 1981–1996) have a significantly lower prevalence of primary independent contracting than older generations: 4.2 percent for Millennials compared to 7.2 percent for Generation X (defined as those born 1965–1980) and 10.2 percent for Baby Boomers and Matures (defined as individuals born before 1965). [1]
- However, other surveys that capture secondary independent contractors, or those who did informal work as independent contractors show that the prevalence of informal work is lower among older workers.

1. (605)The Department used the generational breakdown used in the MBO Partners 2017 report, "The State of Independence in America." "Millennials" were defined as individuals born 1981–1996, "Generation X" were defined as individuals born 1965–1980, and "Baby Boomers and Matures" were defined as individuals born before 1965.

What demographic information was attained from CWS? [Cont.]

- According to the CWS, white workers are somewhat overrepresented among primary independent contractors; they comprise 85 percent of this population but only 79 percent of the population of workers.
- Conversely, Black workers are somewhat underrepresented (comprising 8 percent and 13 percent, respectively).[1]
- The opposite trends emerge when evaluating the broader category of "informal work", where racial minorities participate at a higher rate than white workers.[2]
- Primary independent contractors are spread across the educational spectrum, with no group especially overrepresented.
- The same trend in education attainment holds for workers who participate in informal work.[3]

1. (610) These numbers are calculated by the Department and based on the CWS respondents who state that their race is "white only" or "black only" as opposed to identifying as multi-racial.
2. (611) K. Abraham, and S. Houseman, "Making Ends Meet: The Role of Informal Work in Supplementing Americans' Income," RSF: The Russell Sage Foundation Journal of the Social Sciences 5(5): 110–31 (2019), https://www.aeaweb.org/conference/ 2019/preliminary/paper/QreAaS2h.
3. (612) Id.

What other sources were used to review demographic data?

- Abraham and Houseman (2019), find that among 18- to 24-year-olds, 41.3 percent did informal work over the past month. The rate fell to 25.7 percent for 45- to 54- year-olds, and 13.4 percent for those 75 years and older. [1]
- According to MBO partners, the COVID–19 pandemic may have accelerated this trend; when accounting for both primary and secondary independent work, 2021 marked the first year that Millennials and members of Generation Z (34 percent and 17 percent of independent workers respectively) outnumbered members of Generation X and Baby Boomers (23 percent and 26 percent respectively) as part of the independent workforce. [2]
- Additionally, Garin and Koustas (2021) find that men comprise both a larger share of independent contractors who perform work through traditional contracting arrangements and those who secure work through online platforms. [3]
- This study also found that a greater share of men than women who earn income in this way are primarily self-employed; women who perform online platform work are more likely to use that work to supplement other income***. [(609) Id.]***

1. (606) K. Abraham, and S. Houseman, "Making Ends Meet: The Role of Informal Work in Supplementing Americans' Income," RSF: The Russell Sage Foundation Journal of the Social Sciences 5(5): 110–31 (2019), https://www.aeaweb.org/conference/2019/preliminary/paper/QreAaS2h. Note that this informal work may be broader than what would be considered independent contracting and includes activities like babysitting/housesitting and selling goods online through sites like eBay and Craigslist.
2. (607)This data comes from the 2021 edition of the MBO Partners report, "The State of Independence in America." While maintaining the generational breakdown used in the 2017 edition, "Generation Z" was additionally defined as individuals born 1997–2012. https://info.mbopartners.com/rs/mbo/images/MBO_2021_State_of_Independence_Research_Report.pdf.
3. (608) Garin, A. and Koustas, D., "The Distribution of Independent Contractor Activity in the United States: Evidence from Tax Filings," (2021). https://www.irs.gov/pub/irs-soi/21-rp-independentcontractor-activity.pdf.

How did the data differ among the sources?

According to the CWS, white workers are somewhat overrepresented among primary independent contractors; they comprise 85 percent of this population but only 79 percent of the population of workers. Conversely, Black workers are somewhat underrepresented (comprising 8 percent and 13 percent, respectively). [1]

1. (610) These numbers are calculated by the Department and based on the CWS respondents who state that their race is "white only" or "black only" as opposed to identifying as multi-racial.

The opposite trends emerge when evaluating the broader category of "informal work", where racial minorities participate at a higher rate than white workers. [2]

2. K. Abraham, and S. Houseman, "Making Ends Meet: The Role of Informal Work in Supplementing Americans' Income," RSF: The Russell Sage Foundation Journal of the Social Sciences 5(5): 110–31 (2019), https://www.aeaweb.org/conference/ 2019/preliminary/paper/QreAaS2h.

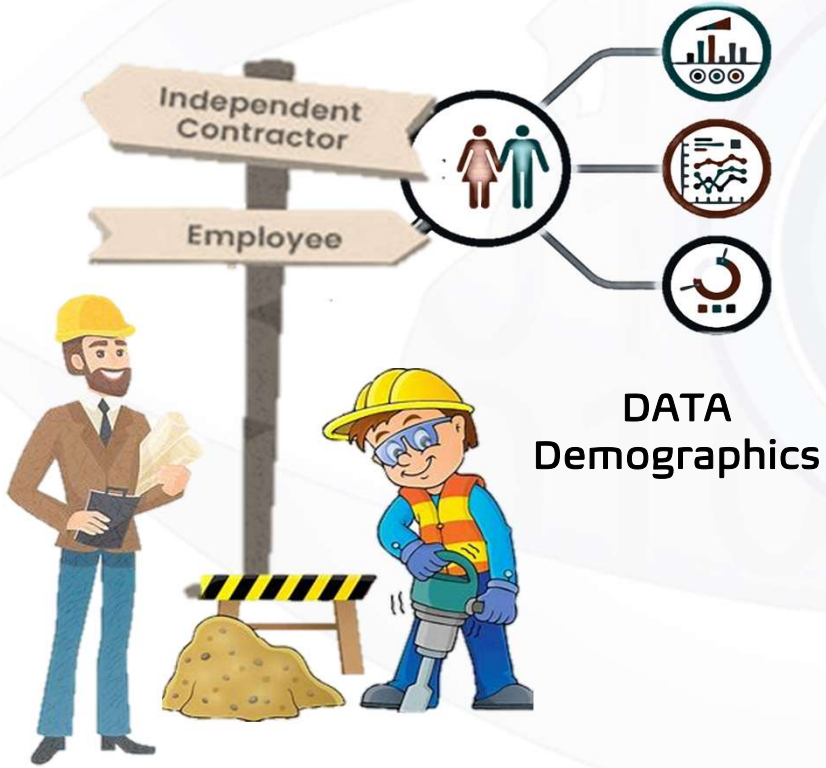
Primary independent contractors are spread across the educational spectrum, with no group especially overrepresented. The same trend in education attainment holds for workers who participate in informal work. [(612) Id.]

An individual commenter wrote that because the COVID–19 pandemic created specific burdens for women and people of color and resulted in the increased participation of both groups in self-employment, the use of 2017 data reduces the inclusion of these workers.

The commenter cited a study from the *Center for Economic Policy and Research (CEPR),* which found "[t]he share of employed women who report being self-employed rose from 7.5 percent in the pre-pandemic period to 8.2 percent: an increase of 0.7 percentage points. By contrast, the share of employed men who report being self-employed rose by just 0.3 percentage points (from 12.1 percent to 12.4 percent).' [3]

3. (613) Annabel Utz, Julie Yixia Cai, & Dean Baker, "The Pandemic Rise in Self-Employment: Who is Working for Themselves Now," Center for Economic and Policy Research. (August 2022). https://cepr.net/the-pandemic-rise-in-selfemployment-who-is-working-for-themselves-now/.

How did the data differ among the sources? [Cont.]



- The study also found "[t]he share of employed Blacks who reported being self-employed rose from 5.8 percent to 6.8 percent: an increase of 1.0 percentage point. . . . For Hispanics, there was a 1.5 percentage point rise in shares from 8.4 percent to 9.9 percent . . . .
- By contrast, the rise in self-employment among whites was just 0.2 percent, from 11.3 to 11.5 percent."
- While the Department acknowledges that the demographic makeup of independent contractors could have shifted following the COVID–19 pandemic, the data cited in the CEPR study includes all self-employed persons, which is a broader population than independent contractors.
- It is possible that this data may also reflect the demographic trends of the more specific population of independent contractors, but the Department has not made any adjustments to its overall estimate of the number of independent contractors.

Table 2 – Characteristics of Workers, ALL Workers and Independent Contractors

TABLE 2—CHARACTERISTICS OF WORKERS, ALL WORKERS AND INDEPENDENT CONTRACTORS

Demographic	Number of workers (millions)	Percent of workers	Number of independent contractors (primary job) (millions)	Percent of independent contractors
Total	158.9	100	10.6	100
By Age				
16–20 (Generation Z)	8.2	5.1	0.1	0.7
21–37 (Millennials)	59.2	37.3	2.5	23.4
38–52 (Generation X)	49.8	31.3	3.6	33.8
53+ (Baby Boomers and Matures)	43.6	27.5	4.5	42.1
By Sex				
Female	75.4	47.4	3.8	35.7
Male	85.4	53.7	6.8	64.3
By Race				
White only	125.6	79.1	9.0	84.6
Black only	20.3	12.8	0.9	8.3
All other races	14.9	9.4	0.8	7.1
By Ethnicity				
Hispanic	27.0	17.0	1.6	14.8
Not Hispanic	133.8	84.2	9.0	85.2
By Industry				
Agr, forestry, fishing, and hunting	2.6	1.6	0.2	2.0
Mining	0.8	0.5	0.0	0.1
Construction	11.0	6.9	2.0	19.3
Manufacturing	16.5	10.4	0.2	2.2
Wholesale and retail trade	20.5	12.9	0.8	7.9
Transportation and utilities	8.0	5.1	0.6	5.7
Information	3.0	1.9	0.2	2.2
Financial activities	10.9	6.9	1.0	9.6
Professional and business services	19.3	12.2	2.7	25.1
Educational and health services	36.2	22.8	1.0	9.6
Leisure and hospitality	15.1	9.5	0.7	6.2
Other services	7.8	4.9	1.0	9.7
Public administration	7.2	4.6	0.0	0.4
By Education				
Less than high school diploma	14.3	9.0	1.0	9.3
High school diploma or equivalent	41.9	26.4	2.6	24.4
Less than Bachelor's degree	45.3	28.5	2.8	26.5
Bachelor's degree	37.3	23.5	2.7	25.5
Master's degree or higher	21.9	13.8	1.5	14.5

Note: Estimates based on the 2017 CPS Contingent Worker Survey.

C. Costs > 1. Rule Familiarization Cost

Overview pg. 96

What does cost represents in the analysis process?

- Regulatory familiarization costs represent direct costs to businesses and current independent contractors associated with reviewing the new regulation. To estimate the total regulatory familiarization costs, the Department used …
  1) the number of establishments and government entities using independent contractors, and the current number of independent contractors;
  2) the wage rates for the employees and for the independent contractors reviewing the rule; and
  3) the number of hours that it estimates employers and independent contractors will spend reviewing the rule.
- This section presents the calculation for establishments first and then the calculation for independent contractors.
- Regulatory familiarization costs may be a function of the number of establishments or the number of firms. [1]
- Presumably, the headquarters of a firm will conduct the regulatory review for businesses with multiple locations and may require some locations to familiarize themselves with the regulation at the establishment level.
- Other firms may either review the rule to consolidate key takeaways for their affiliates or they may rely entirely on outside experts to evaluate the rule and relay the relevant information to their organization (e.g., a chamber of commerce).
- The Department used the number of establishments to estimate the fundamental pool of regulated entities—which is larger than the number of firms.
- This assumes that regulatory familiarization occurs at both the headquarters and establishment levels.

1. (614) An establishment is commonly understood as a single economic unit, such as a farm, a mine, a factory, or a store, that produces goods or services. Establishments are typically at one physical location and engaged in one, or predominantly one, type of economic activity for which a single industrial classification may be applied. An establishment contrasts with a firm, or a company, which is a business and may consist of one or more establishments. See BLS, "Quarterly Census of Employment and Wages: Concepts," https://www.bls.gov/opub/hom/cew/concepts.htm.

How did the apartment determine cost?

- To estimate the number of establishments incurring regulatory familiarization costs, the Department began by using the Statistics of U.S. Businesses (SUSB) to define the total pool of establishments in the United States.[1] In 2019, the most recent year available, there were 7.96 million establishments.
- These data were supplemented with the 2017 Census of Government that reports 90,075 local government entities, and 51 state and federal government entities. [2]
- The total number of establishments and governments in the universe used for this analysis is 8,049,229.
- This universe is then restricted to the subset of establishments that engage independent contractors.
- In 2019, Lim et al. used extensive IRS data to model the independent contractor market and found that 34.7 percent of firms hire independent contractors. [3] These data are based on annual tax filings, so the dataset includes firms that may contract for only parts of a year. Multiplying the universe of establishments and governments by 35 percent results in 2.8 million entities.
- The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13–1141) (or a staff member in a similar position) will review the rule. [4]

1. (615) U.S. Census Bureau, 2019 SUSB Annual Datasets by Establishment Industry. https://www.census.gov/data/datasets/2019/econ/susb/2019-susb.html
2. {616) U.S. Census Bureau, 2017 Census of Governments. https://www.census.gov/data/tables/ 2017/econ/gus/2017-governments.html
3. (617) Lim et al., supra n.512, Table 10: Firm sample summary statistics by year (2001–2015), https:// www.irs.gov/pub/irs-soi/19rpindcontractorinus.pdf.
4. (618) A Compensation/Benefits Specialist ensures company compliance with federal and state laws, including reporting requirements; evaluates job positions, determining classification, exempt or non-exempt status, and salary; plans, develops, evaluates, improves, and communicates methods and techniques for selecting, promoting, compensating, evaluating, and training workers. See BLS, "13–1141 Compensation, Benefits, and Job Analysis Specialists," https://www.bls.gov/oes/ current/oes131141.htm.

How did the department determined cost? [Cont.]

- According to the Occupational Employment and Wage Statistics (OEWS), these workers had a median wage of $32.59 per hour in 2022 (most recent data available.[1]
- Assuming benefits are paid at a rate of 45 percent of the base wage, [2] and overhead costs are 17 percent of the base wage, the reviewer's effective hourly rate is $52.80.
- The Department assumes that it will take on average about 1 hour to review the rule.
- In the proposed rule, the Department assumed a review time of 30 minutes, but has increased this estimate in response to concerns from commenters that the regulatory familiarization costs were understated.
- The Department has provided a discussion of these comments at the end of this section.
- The Department believes that 1 hour, on average, is appropriate, because while some establishments will spend longer to review the rule, many establishments may rely on third-party summaries of the changes or spend little or no time reviewing the rule.
- Furthermore, the analysis outlined in this rule aligns with existing judicial precedent and previous guidance released by the Department, with which much of the regulated community is already familiar.
- Total regulatory familiarization costs to businesses in Year 1 are estimated to be $148,749,744 ($52.80 × 1 hour × 2,817,230) in 2022 dollars.

1. (619) The 2021 IC Rule used the mean wage rate to calculate rule familiarization costs, but the Department has used the median wage rate here, because it is more consistent with cost analyses in other Wage and Hour Division rulemakings. The Department used the median wage rate in the Withdrawal Rule. 86 FR 24321. Generally, the Department uses median wage rates to calculate costs, because the mean wage rate has the potential to be biased upward by high-earning outlier wage observations.
2. (620) Calculated using BLS Employer Costs for Employee Compensation data. The Department took the average of the most recent four quarters of Total Benefits per Hour Worked for Civilian Workers (Series ID CMU1030000000000D) divided it by the average of the most recent four quarters of Wages and Salaries Cost per Hour Worked for Civilian Workers (Series ID CMU1020000000000D). https:// www.bls.gov/ncs/data.htm.

What reading timeframe estimate the department assumed for Independent Consultants?

- For regulatory familiarization costs for independent contractors, the Department used its estimate of 22.1 million independent contractors and assumed each independent contractor will spend 30 minutes to review the regulation.
- In the proposed rule, the Department assumed that it would take independent contractors an average of 15 minutes to review the regulation but has also increased this estimate in the final rule in response to commenters' concerns.
- The average time spent by independent contractors is estimated to be shorter than for establishments and governments.
- This difference is in part because the Department believes independent contractors are likely to rely on summaries of the key elements of the rule change published by the Department, worker advocacy groups, media outlets, and accountancy and consultancy firms, as has occurred with other rulemakings.
- This time is valued at $23.46, which is the median hourly wage rate for independent contractors in the CWS of $19.45 updated to 2022 dollars using the gross domestic product (GDP) deflator. [1] [2]
- Therefore, regulatory familiarization costs to independent contractors in Year 1 are estimated to be $259,233,000 ($23.46 × 0.5 hour × 22.1 million).

1. (621)Based on Department calculations using the individual level data. The Department also calculated the mean hourly wage for independent contractors using the CWS data and found that the mean wage in 2017 was $27.29, which would be $32.92 updated to 2022 dollars using the GDP deflator.
2. (622) In the 2021 IC rule the Department included an additional 45 percent for benefits and 17 percent for overhead. These adjustments have been removed here, because independent contractors do not usually receive employer-provided benefits and generally have overhead costs built into their hourly rate.

What were commenters concerned about the cost estimate and reading timeframe?

- The total one-time regulatory familiarization costs for establishments, governments, and independent contractors are estimated to be $408 million.
- Regulatory familiarization costs in future years are assumed to be de minimis.
- Employers and independent contractors would continue to familiarize themselves with the applicable legal framework in the absence of the rule, so this rulemaking is not expected to impose costs after the first year.
- This amounts to a 10-year annualized cost of $56.4 million at a discount rate of 3 percent or $54.3 million at a discount rate of 7 percent.

Multiple commenters said that they were concerned that the Department's rule familiarization cost estimate was too low. Commenters asserted that the Department's initial estimate of 30 minutes to review the rule was too short, and that it would take firms much longer to read and understand the final rule.

'[e]ven individuals with very high rates of reading and comprehension" would need more than two hours to read the full proposal.

Heritage Foundation

"[a]n economically appropriate approach for gauging the scale of familiarization costs is to assume no less than one hour of familiarization time for both affected workers and hiring establishments."

U.S. Chamber of Commerce

"said that while a person could simply read the rule in 30 minutes, it wouldn't be enough time to understand the rule and translate the understanding into advice to be communicated within the organization."

The Coalition for Workforce Innovation

"commented that the complexity of the rulemaking and of the issue of worker classification necessitates more time for review."

Modern Economy Project

Other commenters echoed similar sentiments. In response to all the comments received on this topic, the Department reconsidered the time for rule familiarization and doubled its original estimates, increasing them to 1 hour for potentially affected firms and 30 minutes for independent contractors. **The Department believes that a longer time estimate would not be appropriate because this estimate represents an average of the firms who may spend more time for review, and those who will not spend any time reviewing the rule.**

What were commenters concerns about the department assumptions on who would read the rule?

- Other commenters echoed similar sentiments. In response to all the comments received on this topic, the Department reconsidered the time for rule familiarization and doubled its original estimates, increasing them to 1 hour for potentially affected firms and 30 minutes for independent contractors.
- The Department believes that a longer time estimate would not be appropriate because this estimate represents an average of the firms who may spend more time for review, and those who will not spend any time reviewing the rule.

Some commenters also expressed concerns with the Department's assumption that the rule would be read by a Compensation, Benefits, and Job Analysis Specialist.

"stated that businesses task their high-level, well-trained human resources workers, in-house attorneys, and outside counsel with this responsibility at an hourly rate well exceeding $50."

Coalition for Workforce Innovation

" wrote that the "Department's selection of 'Compensation, Benefits and Job Analysis Specialist' as the model reviewer for its calculation of familiarization costs misunderstands and misrepresents the seriousness and complexity of the regulation being proposed."

U.S. Chamber of Commerce

- The Department acknowledges that in some cases, higher-paid senior workers could be charged with reading this rule, but believes that the use of the Compensation, Benefits, and Job Analysis Specialist hourly wage is consistent with other rules released by the Wage and Hour Division and the Department, including the 2021 IC Rule.623
- The Department notes that it did not receive any comments objecting to the use of this occupation in its rule familiarization calculation in the 2021 IC Rule.

1. 623 86 FR 1228 ("The Department assumes that a Compensation, Benefits, and Job Analysis Specialist (SOC 13–1141) (or a staff member in a similar position) will review the rule.").

C. Costs > 2. Comments Received on the Department's Cost Analysis

Overview pg. 96

What commenters said about the departments lack of cost consideration?

Some commenters asserted that the Department did not properly consider all of the potential costs of the regulation.

"said that the Department did not consider substantial costs of the rule, such as the cost that will arise from businesses being forced to provide health insurance and other benefits to their former independent contractors or the indirect costs of higher taxes. "

Financial Services Institute

The Department notes that these costs would be considered transfers and are discussed in section VII.E of this economic analysis.

Other commenters mentioned that the rule would lead to significant compliance costs for firms.

"commented that in addition to familiarizing themselves with the rule, the firm would have to perform an individualized assessment of the economic relationship with each of their contractors, renegotiate or cancel existing contracts, spend time converting independent contractors into employees, engage with labor unions and elections, and deal with enforcement actions."

Heritage Foundation Fellows

"said that the ongoing cost of compliance for employers is considerable. They stated that applying this rule only to independent financial professionals would create an obligation for employers to track the earnings and hours worked for more than 140,000 independent financial professionals in the U.S. "

Cetera Financial Group

Other commenters wrote that the rule would actually reduce compliance costs.

"urged the Department to consider reduced compliance costs as an important impact of the rule. They stated that the rule will improve public understanding of legal obligations because it codifies judicial precedent in a comprehensive, accessible, and reliable format.

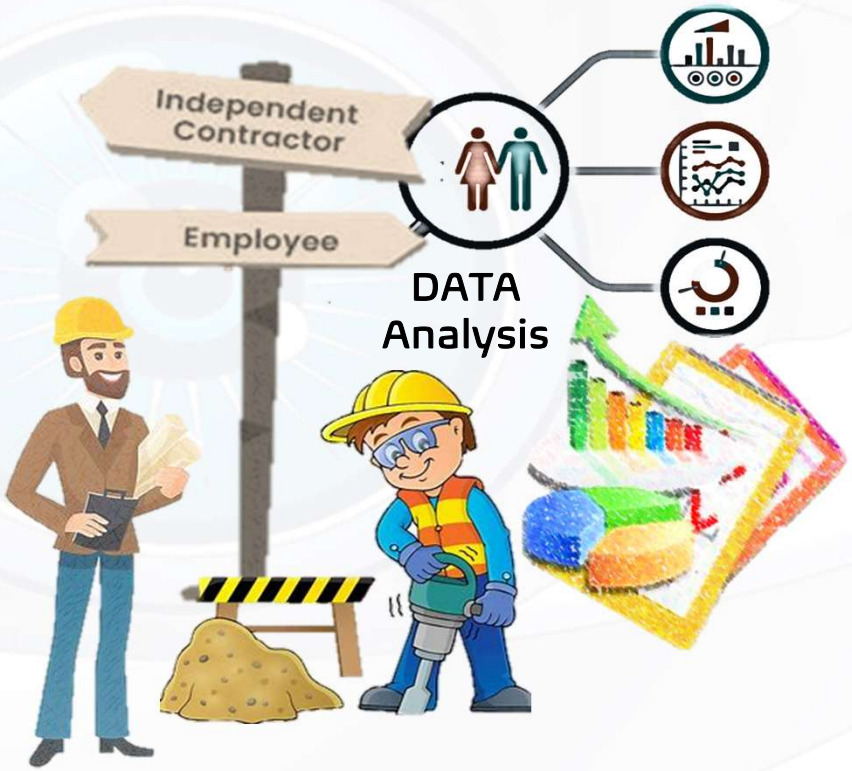
LIUNA

D. Benefits and Transfers > 1. Increased Consistency

Overview pg. 97

How would this rule analysis provide businesses guidance on proper worker classification?

- This rule presents a detailed analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule.
- This analysis will provide more consistent guidance to employers in properly classifying workers as employees or independent contractors, as well as useful guidance to workers on whether they are correctly classified as employees or independent contractors.
- The analysis will provide a consistent approach for those businesses that engage (or wish to engage) independent contractors, who the Department recognizes play an important role in the economy.
- The rule's consistency with judicial precedent could also help to reduce legal disputes.



D. Benefits and Transfers > 2. Reduced Misclassification

Overview pg. 97

Who is impacted the most when it comes to misclassification?

According to VARIOUS reports EXAMINED > misclassification disproportionately affects …

BLACKS | INDIGENOUS | PEOPLE OF COLOR (BIPOC)

DUE TO disparity in occupations affected by misclassification.

What purpose of the FLSA does misclassification contravenes?

ELIMINATING "unfair method[s] of competition in commerce."

What happens when employers misclassified workers as Independent Consultants?

They ILLEGALLY …

Cut Labor Costs

Are Undermining law-abiding competitors

While the services offered may be comparable at face value, the employer engaging in misclassification is able to offer lower estimates and employers following the rules are left at a disadvantage.

How will this guidance reduce worker misclassification?

- This rule will provide consistent guidance to employers in properly classifying workers as employees or independent contractors, as well as useful guidance to workers on whether they are correctly classified as employees or independent contractors.
- This clear guidance could help reduce the occurrence of misclassification.
- The prevalence of misclassification of employees as independent contractors is unclear, but the literature indicates it is substantial.
- A 2020 National Employment Law Project (NELP) report, for example, reviewed state audits and concluded that "these state reports show that 10 to 30 percent of employers (or more) misclassify their employees as independent contractors." [1]
- Similarly, a 2000 Department of Labor study also found that among audits from nine states, "employers with misclassified workers ranged from approximately 10% to 30%." [2]
- This same report found that depending on the state, between 1 percent and 9 percent of workers are misclassified as independent contractors.
- Misclassification disproportionately affects Black, indigenous, and people of color (BIPOC) because of the disparity in occupations affected by misclassification. [3]

1. (624) NELP, "Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries," (Oct. 2020), https://www.nelp.org/publication/independentcontractor-misclassification-imposes-huge-costsworkers-federal-state-treasuries-update-october2020.
2. (625) Lalith de Silva, Adrian Millett, Dominic Rotondi, and William F. Sullivan, "Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs" Report of Planmatics, Inc., for U.S. Department of Labor Employment and Training Administration (2000), https://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.
3. (626) NELP, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries, (Oct. 2020) (describing how misclassification rates are higher in certain industries such as construction, trucking, janitorial, and home care work), https://www.nelp.org/publication/independent-contractormisclassification-imposes-huge-costs-workersfederal-state-treasuries-update-october-2020.

What concerns commenters had?

Commenters echoed these concerns and provided additional supporting information.

"[d]ue to occupational segregation, the sectors in which misclassification is most prevalent are comprised disproportionately [of] BIPOC workers, especially Black and immigrant workers." [1]

joint comment from the Lawyers Committee for Civil Rights Under Law (LCCRUL) and The Washington Lawyer's Committee for Civil Rights and Urban Affairs (WLC)

Looking at 2021 BLS data, LCCRUL and WLC noted that 41% of workers in the construction industry identify as Black, Asian, or Hispanic. As discussed in the section below, research has shown that misclassification is prevalent in the construction industry. LCCRUL and WLC also point out, "[i]n gig-based jobs, where the classification of workers as independent contractors is a defining characteristic of the industry, people of color and immigrants are also overrepresented: 30% of Latinx adults, 20% of Black adults, and 19% of Asian adults work in such jobs, compared to 12% of white adults." [2]

"agreed, stating, "[i]ndependent contractor misclassification by companies is also strikingly racialized, occurring disproportionately in occupations in which people of color, including Black, Latinx, and Asian workers, are overrepresented."

NELP analyzed the March 2022 Current Population Survey Annual Social and Economic Supplement (CPS ASEC) data and found that workers of color comprise just over a third of workers overall but comprise between 47 and 91 percent of workers in industries such as construction, trucking, delivery, home care, agricultural, personal care, ridehail, and janitorial and building service. [3]

NELP

1. (627) Marina Zhavoronkova et al., Occupational Segregation in America, Center for American Progress (Mar. 29, 2022), https://www.americanprogress.org/article/occupational-segregation-inamerica/.
2. (628) Risa Gelles-Watnick & Monica Anderson, Racial and Ethnic Differences Stand Out in the U.S. Gig Workforce, PEW RSCH. CTR. (Dec. 15, 2021), https://www.pewresearch.org/fact-tank/2021/12/15/ racial-and-ethnic-differencesstand-out-in-the-u-sgig-workforce/.
3. (629) NELP analysis of March 2022 Current Population Survey Annual Social and Economic Supplement microdata. For underlying data, see CPS Annual Social and Economic Supplement, U.S. Census Bureau, https://data.census.gov/mdat/#/search?ds=CPSASEC2022.

What effects misclassification of workers have for all parties involved?

- Misclassification contravenes one of the purposes of the FLSA: eliminating "unfair method[s] of competition in commerce." [(630) 29 U.S.C. 202(a), (b)].
- When employers misclassify employees as independent contractors, they illegally cut labor costs, undermining law-abiding competitors. [(631) Id.]
- While the services offered may be comparable at face value, the employer engaging in misclassification is able to offer lower estimates and employers following the rules are left at a disadvantage.
- Multiple commenters also provided data on the prevalence and harms of misclassification, specifically in the construction industry.
- For example, the Illinois Economic Policy Institute (ILEPI), the National Electrical Contractors Association (NECA) and the International Brotherhood of Electrical Workers (IBEW), the United Brotherhood of Carpenters and Joiners (UBC), and North America's Building Trades Unions (NABTU), among others, all cite to a study from Russell Ormiston et al., which found that between 12 and 21 percent of the construction industry workforce were either misclassified as independent contractors or working "off-the-books." [1]

1. (632) Russel Ormiston, Dale Belman, & Mark Erlich, "An Empirical Methodology to Estimate the Incidence and Costs of Payroll Fraud in the Construction Industry," (Jan. 2020), available at https://stoptaxfraud.net/wp-content/uploads/2020/ 03/National-Carpenters-Study-Methodology-forWage-and-Tax-Fraud-Report-FINAL.pdf

How has misclassification impacted the construction industry?

- The paper notes that these results suggest that "between 1.30 and 2.16 million workers were misclassified or working in cash-only arrangements."
- Although the impacts discussed in this study involve broader labor violations than independent contractor misclassification, its results are still useful for understanding the extent of the problem.
- Commenters asserted that not only is misclassification prevalent in the construction industry, but it is also harmful to workers and to employers who do not misclassify their workers.
- For example, SWACCA noted that when construction companies misclassify their workers, they avoid costs such as overtime, workers' compensation, unemployment insurance, employment taxes, and compliance with health and safety requirements.
- They explained that when "high road" employers are unable to compete with contractors who are misclassifying their workers, it leads to a "race to the bottom," which further degrades working conditions in construction.

EMPLOYEES vs. CONTRACTORS

Which industry has triggered a high number of families being enrolled in U.S. Safety net programs?

Construction Industry Worker Families

Comprise 39% of Safety net Programs recipients, such as Medicaid, TANF, and SNAP.

- UBC discussed a report on the number of construction worker families in the U.S. enrolled in safety net programs, such as Medicaid, Temporary Assistance for Needy Families (TANF), and the Supplemental Nutrition Assistance Program (SNAP).
- UBC noted that the report found, "[s]hockingly, 3 million families, or 39 percent of construction worker families, are enrolled in at least one safety net program, costing state and federal taxpayers $28 billion a year." [1]
- They further explained that "[t]he authors of the report attributed the high degree of reliance on public assistance to a number of factors.
- Chief among those were low pay, wage theft, misclassification as independent contractors, off-the-books payments, and 'payroll fraud.' "
- While the costs discussed in that report reflect a variety of factors, if misclassification contributes to just a share of this overall cost, the costs of misclassification could still be significant, especially for just one industry.
- If this final rule is then able to reduce a fraction of overall misclassification in the U.S., the Department would anticipate benefits for affected workers and businesses in competition.

1. (633) Ken Jacobs, Kuichih Huang, Jenifer MacGillvary and Enrique Lopezlira, "The Public Cost of Low-Wage Jobs in the US Construction Industry," UC Berkeley Labor Center (January 2022), https://laborcenter.berkeley.edu/the-publiccost-of-low-wage-jobs-in-the-us-constructionindustry/

E. Additional Discussion of Transfers > 1. Employer-Provided Fringe Benefits

Overview pg. 97

What effect does misclassification has on health insurance?

- Misclassification of independent contractors culminates in a reduced social safety net starting with the individual and cascading out through the local, state, and federal programs.
- Employees who are misclassified as independent contractors generally do not receive employer-sponsored health and retirement benefits, potentially resulting in or contributing to long-term financial insecurity.
- Employees are more likely than independent contractors to have health insurance.
- According to the CWS, 75.4 percent of independent contractors have health insurance, compared to 84.0 percent of employees.
- This gap between independent contractors and employees is also true for low-income workers.
- Using CWS data, the Department compared health insurance rates for workers earning less than $15 per hour and found that 71.0 percent of independent contractors have health insurance compared with 78.5 percent of employees.
- Lastly, the Department considered whether this gap could be larger for traditionally underserved groups or minorities.
- Considering the subsets of independent contractors who are female, Hispanic, or Black, only the Hispanic independent contractors have a statistically significant difference in the percentage of workers with health insurance (estimated to be about 18 percentage points lower).[1]

1. (634) To measure if the difference between these proportions is statistically significant, the Department used the replicate weights for the CWS. At a 0.05 significance level, the proportion of Hispanic independent contractors with any health insurance is lower than the proportion for all independent contractors.

How do misclassification impact retirement and savings?

- Additionally, a major source of retirement savings is employer-sponsored retirement accounts.
- According to the CWS, 55.5 percent of employees have a retirement account with their current employer; in addition, the BLS Employer Costs for Employee Compensation (ECEC) found that in 2022, employers paid 5.1 percent of employees' total compensation in retirement benefits on average ($2.16/ $42.48).[1]
- A 2017 Treasury study found that in 2014, while forty two percent of wage earners made contributions to an individual retirement account (IRA) or employer plan, only eight percent of self-employed individuals made any retirement contribution.[2]
- Smaller retirement savings could result in a long-term tax burden to all Americans due to increased reliance upon social assistance programs.
- To the extent that this rule would reduce misclassification, it could result in transfers to workers in the form of employer-provided benefits like health care and retirement benefits.
- The National Retail Federation questioned this assumption, asserting that "it does not take into account the myriad of insurance arrangements that are available to individuals and their families."
- While some independent contractors do have health insurance, as evidenced in the data discussed above, they are insured at a lower rate than employees.

1. (635) BLS Employer Costs for Employee Compensation—December 2022. https://www.bls.gov/news.release/pdf/ecec.pdf.
2. 636 Jackson, E., Looney, A., & Ramnath, S., Department of Treasury, The Rise of Alternative Work Arrangements: Evidence and Implications for Tax Filing and Benefit Coverage, Working Paper #114 (Jan. 2017), https://home.treasury.gov/system/ files/131/WP-114.pdf. As discussed in the 2021 IC Rule, this study defines retirement accounts as "employer-sponsored plans," which may not encompass all of the possible long-term saving methods. See 86 FR 1217.

How did the department calculate the average cost of benefits?

- As shown in Table 3 [on next slide] , using data from BLS Employer Costs for Employee Compensation, the Department has calculated the average cost to employers for various benefits as a percentage of the average cost to employers for wages and salaries.
- This share was then applied to the median weekly wage of both full-time and parttime independent contractors to estimate the value of these benefits to an average independent contractor if they were to begin receiving these benefits.
- The Department estimated that the value of these benefits could average more than $15,000 annually for fulltime independent contractors and more than $6,000 annually for part-time independent contractors.
- This example transfer estimate could be reduced if there is a downward adjustment in the worker's wage rate to offset a portion of the employer's cost associated with these new benefits.

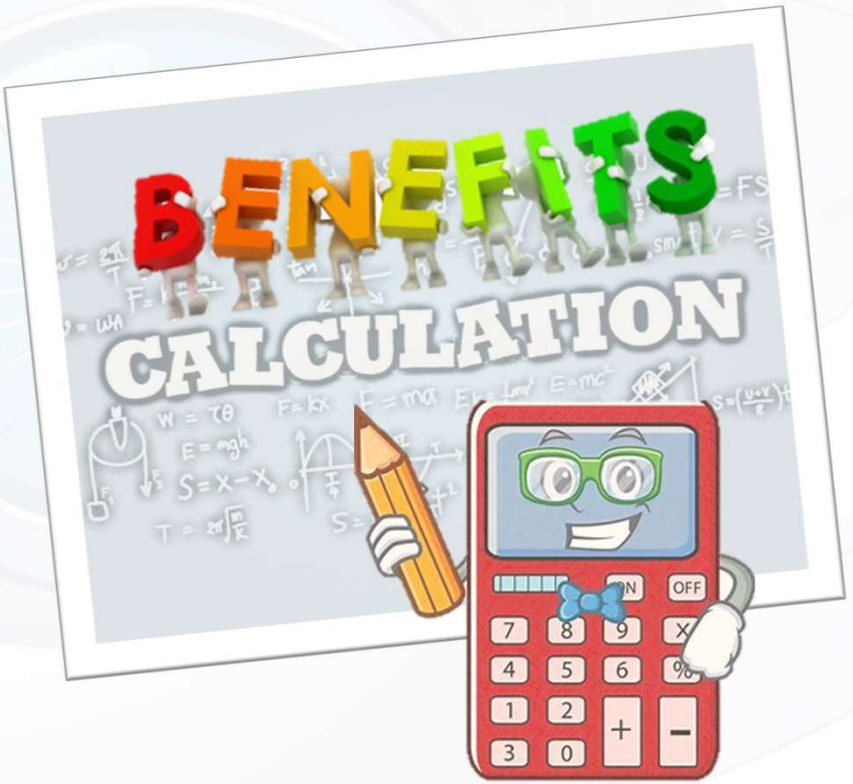


Table 3: Potential, Transfers Associated With Employer-Provided Fringe Benefits

TABLE 3—POTENTIAL TRANSFERS ASSOCIATED WITH EMPLOYER-PROVIDED FRINGE BENEFITS

Employer-provided benefit	Employer cost for benefit as a share of employer cost for wages and salaries (%) (Q4 2022) [a]	Value of benefit for the median weekly wage of a full-time independent contractor ($1017) [d]	Value of benefit for the median weekly wage of a part-time independent contractor ($398) [d]
Health Insurance	11.2	$113.90	$44.58
Retirement [b]	7.4	75.26	29.45
Paid Leave [c]	10.8	109.84	42.98
Total Annual Value of Benefits	.....	15,547.90	6,084.62

[a] The share for each benefit is calculated as the cost per hour for civilian workers divided by the wages and salaries cost per hour for civilian workers. Series IDs CMU1150000000000D, CMU1180000000000D, and CMU10400000000000D divided by Series ID CMU1020000000000D.
[b] Includes defined benefit and defined contribution retirement plans.
[c] Includes vacation, holiday, sick and personal leave.
[d] Earnings data from the 2017 CWS (*https://www.bls.gov/news.release/conemp.t13.htm*) were inflated to Q3 2022 using GDP Deflator.

E. Additional Discussion of Transfers > 2. Tax Liabilities

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How is tax liabilities impacted by misclassification?

- As self-employed workers, independent contractors are legally obligated to pay both the employee and employer shares of the Federal Insurance Contributions Act (FICA) taxes.
- Thus, if workers' classifications change from independent contractors to employees, there could be a transfer in federal tax liabilities from workers to employers.[1]
- Although this rule only addresses whether a worker is an employee or an independent contractor under the FLSA, the Department assumes in this analysis that employers are likely to keep the status of most workers the same across all benefits and requirements, including for tax purposes.[2]
- These payroll taxes include the 6.2 percent employer component of the Social Security tax and the 1.45 percent employer component of the Medicare tax.[3]
- In sum, independent contractors are legally responsible for an additional 7.65 percent of their earnings in FICA taxes (less the applicable tax deduction for this additional payment).
- Some of this increased tax liability may be partially or wholly paid for by the individuals and companies that engage independent contractors, to the extent that the compensation paid to independent contractors' accounts for this added tax liability.
- However, changes in compensation are discussed separately below. Changes in benefits, tax liability, and earnings must be considered in tandem to identify how the standard of living may change.

1. (637) See 86 FR 1218.
2. (638) Courts have noted that the FLSA has the broadest conception of employment under federal law. See, e.g., Darden, 503 U.S. at 326. To the extent that businesses making employment status determinations base their decisions on the most demanding federal standard, a rulemaking addressing the standard for determining classification of worker as an employee or an independent contractor under the FLSA may affect the businesses' classification decisions for purposes of benefits and legal requirements under other federal laws.
3. (639) Internal Revenue Service, "Publication 15, (Circular E), Employer's Tax Guide" (2023 https:// www.irs.gov/publications/p15. The social security tax has a wage base limit of $160,200 in 2023. There is no wage base limit for Medicare Tax.

What's the departments stance on employers' compliance with other laws?

No statement will be made by the department on compliance with *other laws outside of* FLSA.

- The Coalition to Promote Independent Entrepreneurs contended that the Department's analysis of transfers is problematic and that the claim that employers are likely to keep the status of most workers the same across all benefits and requirements is legally incorrect.
- In the Department's enforcement experience, employers generally classify workers as employees or independent contractors for all purposes.
- The Department is not making any statement regarding employers' compliance with other laws that use different standards for employee classification than the FLSA.
- In addition to affecting tax liabilities for workers, this rule could have an impact on state tax revenue and budgets.
- Misclassification results in lost revenue and increased costs for states because states receive less tax revenue than they otherwise would from payroll taxes, and they have reduced funds to unemployment insurance, workers' compensation, and paid leave programs.[1]
- Although it has not been updated more recently, the IRS conducted a comprehensive worker misclassification estimate in 1984 using data collected by auditors.

1. (640) See, e.g., Lisa Xu and Mark Erlich, Economic Consequence of Misclassification in the State of Washington, Harvard Labor and Worklife Program, 2 (2019), https://lwp.law.harvard.edu/files/lwp/files/wa_study_dec_2019_final.pdf; Karl A. Racine, Issue Brief and Economic Report, Illegal Worker Misclassification: Payroll Fraud in the District's Construction Industry, 13 (September 2019), https://oag.dc.gov/sites/default/files/2019-09/OAGIllegal-Worker-Misclassification-Re

How is tax liabilities impacted by misclassification? [Cont.]

- At the time, the IRS found misclassification resulted in an estimated total tax loss of $1.6 billion in Social Security taxes, Medicare taxes, Federal unemployment taxes, and Federal income taxes (for Tax Year 1984). [1] [2]
- To the extent workers were incorrectly classified due to misapplication of the 2021 IC Rule, that could have led to reduced tax revenues.
- Generally, employer requirements pertaining to unemployment insurance, disability insurance, or worker's compensation are on behalf of employees, therefore independent contractors do not have access to those benefits.
- Reduced unemployment insurance, disability insurance, and worker's compensation contributions result in reduced disbursement capabilities.
- Misclassification of employees as independent contractors thus impacts the funds paid into such state programs.
- Even if the misclassified worker is unaffected because they need no assistance, the employer has not paid into the programs as required.
- As a result, the state has diminished funds for those who require the benefits.
- For example, in Tennessee, from September 2017 to October 2018, the Uninsured Employers Fund unit "assessed 234 penalties against employers for not maintaining workers' compensation insurance, for a total assessment amount of $2,730,269.60." [3]
- This amount represents only what was discovered by the taskforce in thirteen months and in just one state.
- By rescinding the 2021 IC Rule, this rule could prevent this increased burden on government entities.

1. (641) Treasury Inspector General for Tax Inspection 2013, Employers Do Not Always Follow Internal Revenue Service Worker Determination Rulings, https://www.oversight.gov/sites/default/files/oigreports/TIGTA/201330058fr_0.pdf.
2. (642) Adjusted for inflation using the CPI–U, the current value of this tax loss would be $4.5 billion.
3. (643) NELP, supra n.553.

What taxes are Independent Contractors responsible for?

Independent Contractors are responsible for paying their own taxes. This taxes are paid by the employer for every employee, but as an independent contractor the responsibility shifts.

Contractors are legally obligated to pay both the employee and employer shares of the Federal Insurance Contributions Act (FICA) taxes.

These payroll taxes include the 6.2 percent employer component of the Social Security tax and the 1.45 percent employer component of the Medicare tax.

7.65% **More of their earnings in FICA taxes.**

What benefits employees gain from FLSA protections?

The FLSA protections ONLY APPLY to employees. Since it applies to employees only, employers are then required to offer and/or cover the following…

- **Federal Insurance Contributions Act (FICA) taxes**
- **Employer-Sponsored Retirement Plan**
- **Employer-Sponsored Benefits [Healthcare, IRA's, 401K]**
- **Worker's Compensation, Disability & Unemployment Insurance**
- **Overtime Pay, Minimum Wage Protection**

E. Additional Discussion of Transfers > 3. FLSA Protections

Overview pg. 97

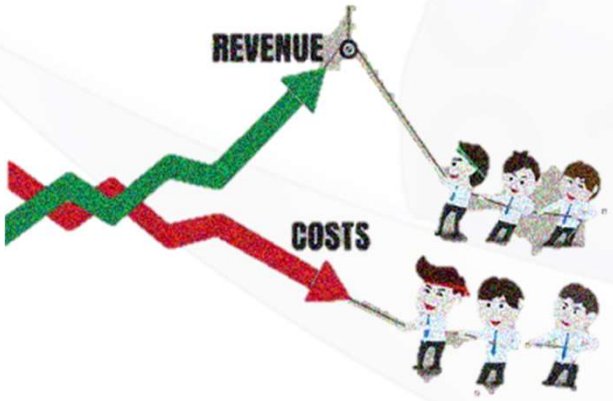
What protections FLSA has for employees?

- When workers are properly classified as independent contractors, the minimum wage, overtime pay, and other requirements of the FLSA no longer apply.
- The 2017 CWS data indicate that independent contractors are more likely than employees to report earning less than the FLSA minimum wage of $7.25 per hour (8 percent for self-employed independent contractors, 5 percent for other independent contractors, and 2 percent for employees).
- Concerning overtime pay, not only do independent contractors not receive the overtime pay premium, but the number of overtime hours worked (more than 40 hours in a workweek) by independent contractors is also higher.
- Analysis of the CWS data indicated that, before conditioning on covariates, primary self-employed independent contractors are more likely to work overtime at their main job than employees, as 29 percent of self-employed independent contractors reported working overtime versus just 17 percent for employees. [1]
- Additionally, independent contractors who work overtime tend to work more hours of overtime than employees.
- According to the Department's analysis of CWS data, among those who usually work overtime, the mean usual number of overtime hours for independent contractors is 15.4 and the mean for employees is 11.8 hours.
- Independent contractors are also not protected by other provisions in the FLSA that are centered on ensuring that women are treated fairly at work, including employer-provided accommodations for breastfeeding workers and protections against pay discrimination.

1. (644) The Department based this calculation on the percentage of workers in the CWS data who respond to the PEHRUSL1 variable ("How many hours per week do you usually work at your main job?") with hours greater than 40. Workers who answer that hours vary were excluded from the calculation. The Department also applied the exclusion criteria used by Katz and Krueger (exclude workers reporting weekly earnings less than $50 and workers whose calculated hourly rate (weekly earnings divided by usual hours worked per week) is either less than $1 or more than $1,000).

How will this rule reduce misclassification?

Individuals who are classified as "EMPLOYEES" – this rule will increase hourly wages for workers earning below the minimum wage and increase overtime pay for any overtime hours worked.



- As discussed above, compared to the 2021 IC Rule, this rule could result in reduced misclassification of employees as independent contractors.
- Any reduction in misclassification that occurs because of this rule would lead to an increase in the applicability of these FLSA protections for workers and subsequently may result in transfers relating to minimum wage and overtime pay.
- Specifically, to the extent misclassified workers were not earning the minimum wage, reduced misclassification would increase hourly wages for these workers to the federal minimum wage.
- Similarly, to the extent misclassified workers were not receiving the applicable overtime pay, reduced misclassification would increase overtime pay for any overtime hours they continued to work.
- However, compared to the current economic and legal landscape where courts and parties outside the Department are not necessarily using the 2021 IC Rule's framework for analyzing employee or independent contractor classification and are instead continuing to use longstanding judicial precedent and guidance that the Department was relying on prior to March of 2022, these transfers (and the other transfers discussed above) would be less likely to occur.

E. Additional Discussion of Transfers > 4. Hourly Wages, Bonuses, and Related Compensation

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How the department determined the independent contractors average wage?

- In addition to increased compliance with minimum wage and overtime pay requirements, potential transfers may also result from this rulemaking as a consequence of differences in earnings between employees and independent contractors. [1]
- Independent contractors are generally expected to earn a wage premium relative to employees who perform similar work to compensate for their reduced access to benefits and increased tax liability. However, this may not always be the case in practice.
- The Department compared the average hourly wages of current employees and independent contractors to provide some indication of the impact on wages of a worker who is reclassified from an independent contractor to an employee.
- The Department used an approach similar to Katz and Krueger (2018).[2]
- Both regressed hourly wages on independent contractor status [3] and observable differences between independent contractors and employees (e.g., occupation, sex, potential experience, education, race, and ethnicity) to help isolate the impact of independent contractor status on hourly wages.
- Katz and Krueger used the 2005 CWS and the 2015 RAND American Life Panel (ALP) (the 2017 CWS was not available at the time of their analysis). The Department used the 2017 CWS. [4]

1. (645) The discussion of data on the differences in earnings between employees and independent contractors in the 2021 IC Rule was potentially confusing and included some evidence that was not statistically significant, so the findings and methodology are discussed again here.
2. (646) L. Katz and A. Krueger, "The Rise and Nature of Alternative Work Arrangements in the United States, 1995–2015," (2018).
3. (647) On-call workers, temporary help agency workers, and workers provided by contract firms are excluded from the base group of "traditional" employees.
4. (648) In both Katz and Krueger's regression results and the Department's calculations, the following outlying values were removed: workers reporting earning less than $50 per week, less than $1 per hour, or more than $1,000 per hour. Choice of exclusionary criteria from Katz and Krueger (2018).

How the department determined the independent contractors average wage? [Cont.]

- Both analyses found similar results. A simple comparison of mean hourly wages showed that independent contractors tend to earn more per hour than employees (e.g., $27.29 per hour for all independent contractors versus $24.07 per hour for employees using the 2017 CWS).
- However, when controlling for observable differences between workers, Katz and Krueger found no statistically significant difference between independent contractors' and employees' hourly wages in the 2005 CWS data.
- Although their analysis of the 2015 ALP data found that primary independent contractors earned more per hour than traditional employees, they recommended caution in interpreting these results due to the imprecision of the estimates.[1]
- The Department found no statistically significant difference between independent contractors' and employees' hourly wages in the 2017 CWS data.
- Based on these results, the Department believes it is inappropriate to conclude independent contractors generally earn a higher hourly wage than employees.
- The Department ran another hourly wage rate regression including additional variables to determine if independent contractors in underserved groups are impacted differently by including interaction terms for female independent contractors, Hispanic independent contractors, and Black independent contractors.
- The results indicate that in addition to the lower wages earned by Black workers in general, Black independent contractors also earn less per hour than independent contractors of other races; however, this is not statistically significant at the most commonly used significance level. [2]

1. (649) See top of page 20, "Given the imprecision of the estimates, we recommend caution in interpreting the estimates from the [ALP]." The standard error on the estimated coefficient on the independent contractor variable in Katz and Kreuger's regression based on the 2015 ALP is more than 2.5 times larger than the standard error of the coefficient using the 2017 CWS.
2. (650) The coefficient for Black independent contractors was negative and statistically significant at a 0.10 level (with a p-value of 0.067). However, a significance level of 0.05 is more commonly used.

How the department determined the independent contractors average wage? [Cont.]

- A group of DC economists provided a comment discussing an analysis they performed using aggregate data and analysis from individual-level IRS tax data from Washington, DC. [1]
- In their study, they found that taxpayers who switched from employment to self-employment saw a decrease in income and vice versa.
- They found, "[b]etween 2013–2018 switching from a typical wage-earning job to self-employment, was associated with a 20–50 percent drop in income, while switching away from self-employment was associated with an income increase of 65–85 percent."
- They also note that low income tax filers who switched from self-employment to a wage-earning job approximately doubled their income from 2013–2018.
- However, this analysis is specifically focused on workers in Washington, DC, and the definition of self-employment may differ from independent contractor classification under the FLSA.
- The Coalition for Workforce Innovation asserted that the Department failed to consider additional studies reconfirming that independent contractors earn more than traditional employees.
- They cite the Upwork study, saying *"[t]he number of freelancers who earn more by freelancing than in their traditional jobs continues to grow: 44% of freelancers say they earn more freelancing than with a traditional job in 2021, . . . up from 39% in 2020 and 32% in 2019."* [2]

1. (651) This analysis can also be found at: https://oracfo.dc.gov/blog/self-employment-income-
2. (652) "Upwork Study Finds 59 Million Americans Freelancing Amid Turbulent Labor Market," Upwork, December 8, 2021, https://www.upwork.com/press/releases/upwork-studyfinds-59-million-americans-freelancing-amidturbulent-labor-market. Full study available at https://www.upwork.com/research/freelanceforward-2021.

How the department determined the independent contractors average wage? [Cont.]

- The Department notes that even if 44% of freelancers say that they earn more than they would under traditional employment, that would still mean that a larger share of freelancers (56%) either report earning the same or less than with traditional employment.
- Also, as discussed in section VII.B.1, the nature of this study and its definition of freelancing may not be applicable to how independent contracting is discussed in this rule.
- The Economic Policy Institute (EPI) also submitted a comment with a quantitative analysis of the difference in the value of a job to a worker who is classified as an independent contractor rather than as an employee.
- Their analysis reviewed data for workers in 11 occupations identified as particularly vulnerable to misclassification: construction workers, truck drivers, janitors and cleaners, home health and personal care aides, retail sales workers, housekeeping cleaners, landscaping workers, call center workers, security guards, light truck delivery drivers, and manicurists and pedicurists.

Which industries are particularly vulnerable to misclassification?

construction workers

retail sales workers

janitors and cleaners

home health and personal care aides

Which industries are particularly vulnerable to misclassification? [Cont.]

truck drivers

landscaping workers

Housekeeping cleaners

light truck delivery drivers

Which industries are particularly vulnerable to misclassification? [Cont.]

manicurists and pedicurists

call center workers

security guards

F. Analysis of Regulatory Alternatives

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How many alternative options were reviewed by the department?

4

Pursuant to its obligations under Executive Order 12866,[1] the Department assessed four regulatory alternatives to this rule.

Question	Answer
How many were considered and rejected?	▪ The Department had previously considered and rejected two of these alternatives in the 2021 IC Rule— adopting either a common law or ABC test for determining employee or independent contractor status.[2] ▪ The Department reaches the same conclusion in this final rule. Section IV above discusses why legal constraints prevent the Department from adopting either of these alternatives and the comments received regarding these alternatives.
What was the 3rd alternative?	▪ The Department considered a rule that would not fully rescind the 2021 IC Rule and instead retain some aspects of that rule. As the Department has noted throughout this final rule, there are multiple instances in which it is consistent or in agreement with the 2021 IC Rule. ▪ However, the numerous ways in which the 2021 IC Rule described the factors were in tension with judicial precedent and longstanding Department guidance and narrowed the economic reality test by limiting the facts that may be considered as part of the test, facts which the Department believes are relevant in determining whether a worker is economically dependent on the employer for work or in business for themself.
What was the 4th alternative?	▪ For a fourth alternative, the Department considered rescinding the 2021 IC Rule and providing guidance on employee and independent contractor classification through sub-regulatory guidance.
What was the final conclusion?	▪ For these reasons, and as discussed in sections III and IV above, the Department has ultimately concluded that a complete recission and replacement of the 2021 IC Rule is needed.

1. (653) E.O. 12866 section 6(a)(3)(C)(iii), 58 FR 51741.
2. (654) See 86 FR 1238

What has the department primarily used to issue guidance?

For More than

YEARS

Prior to the 2021 IC Rule, the Department primarily issued sub-regulatory guidance in this area and did not have generally applicable regulations on the classification of workers as employees or independent contractors.

- The Department considered rescinding the 2021 IC Rule and continuing to provide sub-regulatory guidance for stakeholders through existing documents (such as Fact Sheet #13) and new documents (for example a Field Assistance Bulletin).
- Rescinding the 2021 IC Rule without issuing a new regulation would have lowered the regulatory familiarity costs associated with this rulemaking.
- As explained in sections III, IV, and V above, however, the Department continues to believe that replacing the 2021 IC Rule with regulations addressing the multifactor economic reality test that more fully reflect the case law and continue to be relevant to the modern economy will be helpful for both workers and employers.
- Specifically, issuing regulations with an explanatory preamble allows the Department to provide in-depth guidance.
- Additionally, issuing regulations allowed the Department to formally collect and consider a wide range of views from stakeholders by electing to use the notice-and-comment process.
- Finally, because courts are accustomed to considering relevant agency regulations, providing guidance in this format may further improve consistency among courts regarding this issue.
- Therefore, the Department is not rescinding the 2021 IC Rule and providing only sub-regulatory guidance.

VIII. Final Regulatory Flexibility Act (FRFA) Analysis

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What does the Regulatory Flexibility Act of 1980 (RFA) requires of federal agencies?

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires Federal agencies engaged in rulemaking to …

Consider the impact of their rules on small entities, consider alternatives to minimize that impact, and solicit public comment on their analyses.

Assess the impact of a regulation on a wide range of small entities, including small businesses, not-for profit organizations, and small governmental jurisdictions.

Perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities.

A. Need for Rulemaking and Objectives of the Rule

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What triggered the rule change?

The re-activation of DOL's 2021 IC Rule which was withdrawn by the Department prior to being re-instated by the Eastern District of Texas .

A district court in the Eastern District of Texas issued a decision vacating the Department's delay and withdrawal of the 2021 IC Rule and concluding that the 2021 IC Rule became effective on March 8, 2021.

The Rule was withdrawn because it did not fully comport with FLSA's text or the courts interpretation, which would have trigger confusion and disruptive effect on workers and businesses alike as it deviated from decades of case law describing and applying the multifactor economic reality test.

Therefore, the Department believes it is appropriate to rescind the 2021 IC Rule and set forth an analysis for determining employee or independent contractor status under the Act that is more consistent with existing judicial precedent and the Department's longstanding guidance prior to the 2021 IC Rule.

Which regulations are impacted by the change?

The Regulations addressing whether workers are employees or independent contractors under the FLSA

What's the main change?

This FINAL Rule DOES NOT use "CORE FACTORS" as the 2021 IC Rule did and instead returns to a Totality-of-the-circumstances analysis of the economic reality test in which the factors DO NOT have a predetermined WEIGHT. This ensures that ALL factors are considered in view of the economic reality of the whole activity.

How will framing of investment be addressed?

This final rule returns to the longstanding framing of investment as a separate factor,

How will "Integral part" be addressed?

The integral factor will now be examined as an integral part of the potential employer's business rather than an integrated unit of production.

How does the final rule enhance previous guidance?

It provides a broader discussion of how scheduling, remote supervision, price setting, and the ability to work for others should be considered under the control factor.

It allows for consideration of reserved rights while removing the provision in the 2021 IC Rule that minimized the relevance of retained rights.

It discusses exclusivity in the context of the permanency factor, and initiative in the context of the skill factor.

Why does the department believe this final rule is better?

Changes to the final rule were made after considering comments received from stakeholders, specially addressing compliance with legal obligations. This includes revisions to the regulations regarding the investment factor and the control factor.

The department believes that rescinding the 2021 IC Rule and replacing it with regulations addressing the multifactor economic reality test—in a way that both more fully reflects the case law and continues to be relevant to the evolving economy—will be helpful for both workers and employers.

The Department believes this rule will help protect employees from misclassification while at the same time providing a consistent approach for those businesses that engage (or wish to engage) independent contractors as well as for those who wish to work as independent contractors.

B. Significant Issues Raised in Public Comments, Including by the Small Business Administration Office of Advocacy

Overview pg. 97

How could this rule impact small businesses?

- Several commenters submitted feedback in response to the NPRM's Initial Regulatory Flexibility Analysis (IRFA) or otherwise addressing the potential impact of this rulemaking on small entities.
- Commenters, including the Small Business Administration Office of Advocacy (SBA) contended that the Department has severely underestimated the economic impacts of this rule on small businesses and independent contractors.
- For example, several commenters criticized the rule familiarization time estimates referenced in the IRFA, with the Independent Electrical Contractors, the Small Business & Entrepreneurship Council ("SBE Council"), and SBA citing the length of the NPRM as evidence that the Department was providing an underestimate.
- By contrast, the SWACCA asserted that the "well understood framework" of the NPRM's proposed guidance would reduce regulatory familiarization costs for stakeholders "compared to the January 2021 Rule's novel, untested weighted framework."
- As explained in section VII.C., the Department considered all of the comments received on this topic and has increased the regulatory familiarization cost estimate for this rule to 1 hour for firms and 30 minutes for independent contractors, who may be small businesses themselves.
- The Department believes that this time estimate is appropriate because it represents an average, in which some small businesses will spend more time reviewing the rule and others will spend no time reviewing.

How did the department identify potential costs of this rulemaking?

- Some commenters asserted that the Department failed to identify other potential costs of this rulemaking.
- For example, SBA wrote that "DOL has failed to estimate any costs for small businesses and independent contractors to reclassify workers as independent contractors, for lost work, and for business disruptions."
- Similarly, SBE Council wrote that the IRFA did "not include the cost to a small business or small entity if an independent contractor is determined to be 'misclassified,' or if a small business or small entity loses business revenue due to the loss of human capital, or the cost to comply with the new rule, or if an independent contractor loses business due to potential or actual misclassification."
- As discussed in greater detail in section III(C) and VII(A), the Department does not believe that this rule will lead to widespread reclassification.
- SBA claimed that the IRFA for failed to address certain employment-related costs related to the reclassification of independent contractors as employees (e.g., payroll tax obligations, employment benefits costs, etc.) that were mentioned in the NPRM's Regulatory Impact Analysis; see also American First Legal Foundation ("AFL") ("The Department failed to consider that small businesses reclassifying independent contractors as employees under the Proposed Rule will substantially increase their respective tax burdens."); Engine (asserting that "startups that err on the side of caution and hire or shift to full-time workers" may have to "offer more robust compensation packages" to compete with larger competitors).
- The Department's Regulatory Impact Analysis only provides a qualitative discussion of these potential transfers and explains that these transfers may result from reduced misclassification resulting from this rule.

How did the department identify potential costs of this rulemaking? [Cont.]

- The Department does not believe that coming into compliance with the law would be a "cost" for the purposes of the economic analyses of this rulemaking.
- SBA also commented that "many independent contractors or freelance workers, who may also be small businesses, believe they will lose work because of this rule."
- The Department does not believe that this rule will lead to job losses because most workers who were properly classified as independent contractors before the 2021 IC Rule will continue to retain their status as independent contractors.
- Finally, AFL was concerned about the Department "treating small businesses the same as all other entities" and asserted that Section 223 of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA") requires the Department to creation an exemption waiving the application of civil money penalties for small entities "that will inevitably misapply the confusing and inconsistent 'economic reality' test." See also Engine ("It is unclear how the proposed rule, if implemented, will be enforced consistent with SBREFA, if the Department does not accommodate differing compliance requirements by waiving or reducing penalties when circumstances warrant.").
- In response to these comments, the Department notes that courts apply the same economic reality test when evaluating the FLSA employment status of any worker alleged to be an independent contractor, regardless of the size of the potential employer.
- Similarly, the Department is striving to provide a generally applicable regulation in this rulemaking.
- As with other enforcement related requests from commenters described in section II.E., whether the Department should reduce or waive certain civil money penalties for small entities found to have violated the FLSA is an enforcement issue that is beyond the scope of this rulemaking.

1. (655) See, e.g., Rutherford, 331 U.S. at 724 (noting that the slaughterhouse involved in the case "had one hourly paid employee" prior to hiring the alleged independent contractors at issue); Silk, 331 U.S. at 706 (describing the employer at issue as an individual named "Albert Silk, doing business as the Albert Silk Coal Co.," who "owns no trucks himself, but contracts with workers who own their own trucks to deliver coal").

C. Estimating the Number of Small Businesses Affected by the Rulemaking

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How did the department determine the number of small businesses?

- The Department used the Small Business Administration size standards, which determine whether a business qualifies for small-business status, to estimate the number of small entities. [1]
- The Department then applied these thresholds to the U.S. Census Bureau's 2017 Economic Census to obtain the number of establishments with employment or sales/receipts below the small business threshold in the industry. [2]
- These ratios of small to large establishments were then applied to the more recent 2019 Statistics of United States Businesses (SUSB) data on number of establishments. [3]
- Next, the Department estimated the number of small governments, defined as having population less than 50,000, from the 2017 Census of Governments. [4]
- In total, the Department estimated there are 6.5 million small establishments or governments who could potentially have independent contractors, and who could be affected by this rulemaking.
- However, not all of these establishments will have independent contractors, and so only a share of this number will actually be affected.
- The impact of this rule could also differ by industry. As shown in Table 2 of the regulatory impact analysis, the industries with the highest number of independent contractors are the professional and business services and construction industries.
- Additionally, as discussed in section VII.B., the Department estimates that there are 22.1 million independent contractors.
- Some of these independent contractors may be considered small businesses and may also be impacted by this rule.

1. (656) SBA, Summary of Size Standards by Industry Sector, 2017, https://www.sba.gov/sites/default/ files/2018-05/Size_Standards_Table_2017.xlsx. The most recent size standards were issued in 2022. However, the Department used the 2017 standards for consistency with the older Economic Census data.
2. (657) The 2017 data are the most recently available with revenue data.
3. (658) For this analysis, the Department excluded independent contractors who are not registered as small businesses, and who are generally not captured in the Economic Census, from the calculation of small establishments.
4. (659) 2017 Census of Governments. https:// www.census.gov/data/tables/2017/econ/gus/2017- governments.html.

D. Compliance Requirements of the Final Rule, Including Reporting and Recordkeeping

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How should this guidance be used and how does it impacts businesses?

This rule provides GUIDANCE for analyzing worker classification under the FLSA. It shall be use to differentiate between an employee and an Independent Contractor.

It does not create any new reporting or recordkeeping requirements for businesses.

What's the estimated cost entities shall foresee for familiarization on this final rule?

In the Regulatory Impact Analysis, the Department estimates that regulatory familiarization to be one hour per entity and one-half hour per independent contractor.

The per-entity cost for small business employers is the regulatory familiarization cost of $52.80, or the fully loaded median hourly wage of a Compensation, Benefits, and Job Analysis Specialist multiplied by 1 hour.

The per-entity rule familiarization cost for independent contractors, some of whom would be small businesses, is $11.73 or the median hourly wage of independent contractors in the CWS multiplied by 0.5 hour.

E. Steps the Department Has Taken To Minimize the Significant Economic Impact on Small Entities

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What steps did the department take to limit the economic impact on businesses?

- The RFA requires agencies to discuss "any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." ***[660 5 U.S.C. 603(c)]***
- As discussed earlier in section VII.F., the Department does not believe that it has the legal authority to adopt either a common law or "ABC" test to determine employee or independent contractor status under the FLSA, foreclosing the consideration of these alternatives for purposes of the RFA.
- As explained in section VII.F., the Department considered two other regulatory alternatives: a rule that would not fully rescind the 2021 IC Rule and instead retain some aspects of that rule in the new rule; and completely rescinding the 2021 IC Rule and providing guidance on employee or independent contractor classification through sub-regulatory guidance, as the Department had done for over 80 years prior to the 2021 IC Rule.
- The Department believes that the overall economic impact of retaining some portions of the 2021 IC Rule while issuing a rule to revise other portions of the rule would not minimize the economic impact on small entitles as they would incur costs to familiarize themselves with the new regulation.
- Similarly, the Department believes that the overall economic impact of fully rescinding the 2021 IC Rule and providing sub-regulatory guidance, would not necessarily minimize the economic impact on small entities as they would incur some costs to familiarize themselves with any sub-regulatory guidance.
- Moreover, as explained in sections III, IV, and V above, the Department believes that replacing the 2021 IC Rule with regulations addressing the multifactor economic reality test that more fully reflect the case law and continue to be relevant to the modern economy will be helpful for both workers and employers, particularly over the long term.

IX. Unfunded Mandates Reform Act of 1995

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What does the Unfunded Mandate require of federal agencies?

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires agencies to …

Prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing any unfunded Federal mandate that may result in excess of $100 million (adjusted annually for inflation) in expenditures in any one year by State, local, and tribal governments in the aggregate, or by the private sector.

Adjusting the threshold for inflation using the GDP deflator, using a recent annual result (2021), yields a threshold of $165 million.

Therefore, this rulemaking is expected to create unfunded mandates that exceed that threshold. See section VII for an assessment of anticipated costs and benefits.

X. Executive Order 13132, Federalism

Overview pg. 97

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Does the rule impacts federalism as it pertains to the relationship between stakeholders?

- The Department has reviewed this rule in accordance with Executive Order 13132 regarding federalism and determined that it does not have federalism implications.
- The rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government.

https://www.federalregister.gov/documents/1999/08/10/99-20729/federalism

XI. Executive Order 13175, Indian Tribal Governments

Overview pg. 97

Will this rule have tribal implications on the relationship between Indian Tribes and the Federal Government?

- This rule will not have tribal implications under Executive Order 13175 that require a tribal summary impact statement.
- The rule will not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

https://www.federalregister.gov/documents/2000/11/09/00-29003/consultation-and-coordination-with-indian-tribal-governments

List of Subjects

What sections of 29 CFR are impacted by this rule?

The Code of Federal Regulations Title 29: Labor sections impacted by this final rule are …

29 CFR Part 780 Agriculture, Child labor, Wages.

29 CFR Part 788 Forests and forest products, Wages

29 CFR Part 795 Employment, Wages.

For the latest changes go to: https://www.ecfr.gov/current/title-29

What changes took place in Chapter V > Part 780: Agriculture, Child Labor, and Wages?

29 CFR Part 780 Agriculture, Child labor, Wages.

For the reasons set out in the preamble, the Wage and Hour Division, Department of Labor amends Title 29 CFR chapter V, as follows:

1. **PART 780—EXEMPTIONS APPLICABLE TO AGRICULTURE, PROCESSING OF AGRICULTURAL COMMODITIES, AND RELATED SUBJECTS UNDER THE FAIR LABOR STANDARDS ACT**
   - a) **The authority citation for part 780 continues to read as follows:** Authority: Secs. 1–19, 52 Stat. 1060, as amended; 75 Stat. 65; 29 U.S.C. 201–219. Pub. L. 105–78, 111 Stat. 1467.
   - b) **Amend § 780.330 by revising paragraph (b) to read as follows:** § 780.330 Sharecroppers and tenant farmers. * * * * * (b) In determining whether such individuals are employees or independent contractors, the criteria set forth in §§ 795.100 through 795.110 of this chapter are used. * * * * *

What changes took place in Part 788: Forestry or Logging Operations?

For the reasons set out in the preamble, the Wage and Hour Division, Department of Labor amends Title 29 CFR chapter V, as follows:

- **PART 788—FORESTRY OR LOGGING OPERATIONS IN WHICH NOT MORE THAN EIGHT EMPLOYEES ARE EMPLOYED**
  - **a)** **The authority citation for part 788 continues to read as follows:** Authority: Secs. 1–19, 52 Stat. 1060, as amended; 29 U.S.C. 201–219.
  - **b)** **Amend § 788.16 by revising paragraph (a) to read as follows:** § 788.16 Employment relationship. (a) In determining whether individuals are employees or independent contractors, the criteria set forth in §§ 795.100 through 795.110 of this chapter are used. * * * * *

29 CFR Part 788 Forests and forest products, Wages

What will Chapter V: Part 795 Employment, Wages Include?

29 CFR Part 795 Employment, Wages.

- **PART 795—EMPLOYEE OR INDEPENDENT CONTRACTOR CLASSIFICATION UNDER THE FAIR LABOR STANDARDS ACT Sec**.
  - 795.100 Introductory statement.
  - 795.105 Determining employee or independent contractor classification under the FLSA.
  - 795.110 Economic reality test to determine economic dependence.
  - 795.115 Severability.

How will this guideline be used to guide interpretation?

- Authority: 29 U.S.C. 201–219. § 795.100 Introductory statement.
  - This part contains the Department of Labor's (the Department) general interpretations for determining whether workers are employees or independent contractors under the Fair Labor Standards Act (FLSA or Act). See 29 U.S.C. 201–19.
  - These interpretations are intended to serve as a "practical guide to employers and employees" as to how the Department will seek to apply the Act. Skidmore v. Swift & Co., 323 U.S. 134, 138 (1944).
- The Administrator of the Department's Wage and Hour Division will use these interpretations to guide the performance of their duties under the Act, unless and until the Administrator is otherwise directed by authoritative decisions of the courts or the Administrator concludes upon reexamination of an interpretation that it is incorrect.
- To the extent that prior administrative rulings, interpretations, practices, or enforcement policies relating to determining who is an employee or independent contractor under the Act are inconsistent or in conflict with the interpretations stated in this part, they are hereby rescinded.
- The interpretations stated in this part may be relied upon in accordance with section 10 of the Portal-to-Portal Act, 29 U.S.C. 251–262, notwithstanding that after any act or omission in the course of such reliance, the interpretation is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect. 29 U.S.C. 259.

§ 795.105 Determining employee or independent contractor classification under the FLSA.

What's the relevance of workers classification under the Act?

The Act's minimum wage, overtime pay, and recordkeeping obligations apply only to workers who are covered employees.

Workers who are independent contractors are not covered by these protections.

Labeling employees as "independent contractors" does not make these protections inapplicable.

A determination of whether a worker is an employee or independent contractor under the Act focuses on the economic realities of the worker's relationship with the worker's potential employer and whether the worker is either economically dependent on the potential employer for work or in business for themself.

What classifies a worker as an employee?

An "employee" under the Act is an individual whom an employer suffers, permits, or otherwise employs to work.

29 U.S.C. 203(e)(1), (g). "Employer" is defined to "include[ ] any person acting directly or indirectly in the interest of an employer in relation to an employee."

29 U.S.C. 203(d). The Act's definitions are meant to encompass as employees all workers who, as a matter of economic reality, are economically dependent on an employer for work.

A worker is an independent contractor, as distinguished from an "employee" under the Act, if the worker is, as a matter of economic reality, in business for themself.

Economic dependence does not focus on the amount of income the worker earns, or whether the worker has other sources of income.

§ 795.110 Economic reality test to determine economic dependence.

How should the Economic reality test be addressed using this guide?

In order to determine economic dependence, multiple factors assessing the economic realities of the working relationship are used.

These factors are tools or guides to conduct a totality-of-the circumstances analysis.

This means that the outcome of the analysis does not depend on isolated factors but rather upon the circumstances of the whole activity to answer the question of whether the worker is economically dependent on the potential employer for work or is in business for themself.

The six factors described in [the next slides] [paragraphs (b)(1) through (6) of this section] should guide an assessment of the economic realities of the working relationship and the question of economic dependence.

Consistent with a totality-of-the-circumstances analysis, no one factor or subset of factors is necessarily dispositive, and the weight to give each factor may depend on the facts and circumstances of the particular relationship. Moreover, these six factors are not exhaustive.

As explained in paragraph (b)(7) of this section, additional factors may be considered.

(1) Opportunity for profit or loss depending on managerial skill

This factor considers whether the worker has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment) that affect the worker's economic success or failure in performing the work.

Opportunity for Profit or Loss

Question	Answer
Which factors are relevant to this factor?	The following facts, among others, can be relevant: 1) whether the worker determines or can meaningfully negotiate the charge or pay for the work provided; 2) whether the worker accepts or declines jobs or chooses the order and/or time in which the jobs are performed; 3) whether the worker engages in marketing, advertising, or other efforts to expand their business or secure more work; and 4) whether the worker makes decisions to hire others, purchase materials and equipment, and/or rent space.
What if the worker doesn't have no profit or loss?	If a worker has no opportunity for a profit or loss, then this factor suggests that the worker is an employee.
What doesn't reflect the exercise of managerial skills?	Some decisions by a worker that can affect the amount of pay that a worker receives, such as the decision to work more hours or take more jobs when paid a fixed rate per hour or per job, generally do not reflect the exercise of managerial skill indicating independent contractor status under this factor.

(2) Investments by the worker and the potential employer

This factor considers whether any investments by a worker are capital or entrepreneurial in nature.

Question	Answer
What doesn't constitute evidence of capital or entrepreneurial investment?	Costs to a worker of tools and equipment to perform a specific job, costs of workers' labor, and costs that the potential employer imposes unilaterally on the worker- as they indicate employee status.
What delineates the investments deemed capital or entrepreneurial in nature?	Investments that generally support an independent business and serve a business-like function, such as increasing the worker's ability to do different types of or more work, reducing costs, or extending market reach tend to indicate independent contractor status.
What shall be considered when assessing this factor?	The worker's investments should be considered on a relative basis with the potential employer's investments in its overall business.
Do the workers investment need to be equal to the potential employers?	NO. The worker's investments need not be equal to the potential employer's investments and should not be compared only in terms of the dollar values of investments or the sizes of the worker and the potential employer.
What should be the focus when addressing this factor?	Instead, the focus should be on comparing the investments to determine whether the worker is making similar types of investments as the potential employer (even if on a smaller scale) to suggest that the worker is operating independently, which would indicate independent contractor status.

Investment by each party

(3) Degree of permanence of the work relationship

Work Relationship

Question	Answer
What will shift classification to employee under this factor?	When the work relationship is indefinite in duration, continuous, or exclusive of work for other employers.
What will shift classification to Independent Contractor under this factor?	When the work relationship is definite in duration, nonexclusive, project-based, or sporadic based on the worker being in business for themself and marketing their services or labor to multiple entities.
What type of work is included under this factor?	This includes regularly occurring fixed periods of work, although the seasonal or temporary nature of work is not indicative of independent contractor classification.
Will the lack of permanence be indicative of Independent Contractor?	No. Where a lack of permanence is due to operational characteristics that are unique or intrinsic to particular businesses or industries and the workers they employ, this factor is not necessarily indicative of independent contractor status unless the worker is exercising their own independent business initiative.

(4) Nature and degree of control

This factor considers the potential employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship.

Question	Answer
What facts demonstrate potential employer control over worker?	The following facts demonstrate potential control… 1. Whether the potential employer sets the worker's schedule. 2. Supervises the performance of the work 3. Explicitly limits the worker's ability to work for others.
What other facts may demonstrate control?	In addition to the items noted above, a potential employer's control over the worker may include … 1. Whether the potential employer uses technological means to supervise the performance of the work (such as by means of a device or electronically) 2. Reserves the right to supervise or discipline workers 3. Places demands or restrictions on workers that do not allow them to work for others or work when they choose.
What other facts should be considered under this factor?	Whether the potential employer controls economic aspects of the working relationship should also be considered, including control over prices or rates for services and the marketing of the services or products provided by the worker.

Degree of Control

(4) Nature and degree of control [Cont.]

This factor considers the potential employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship.

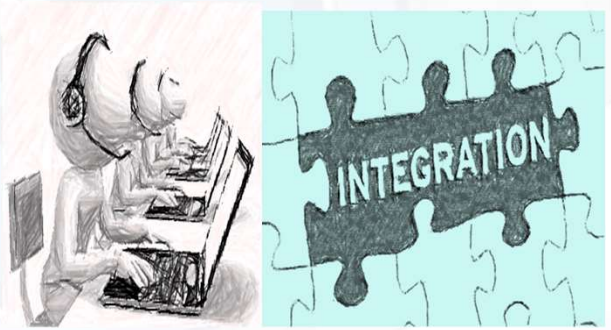
Degree of Control

Question	Answer
Which actions are NOT indicative of control?	Actions taken by the potential employer for the sole purpose of complying with a specific, applicable Federal, State, Tribal, or local law or regulation are not indicative of control.
Which actions are indicative of control?	Actions taken by the potential employer that go beyond compliance with a specific, applicable Federal, State, Tribal, or local law or regulation and instead serve the potential employer's own compliance methods, safety, quality control, or contractual or customer service standards may be indicative of control.
What would dictate worker classification under this factor?	More indicia of control by the potential employer favors employee status; more indicia of control by the worker favors independent contractor status.

(5) Extent to which the work performed is an integral part of the potential employer's business

This factor considers whether the work performed is an integral part of the potential employer's business.

Question	Answer
What does this factor depend on?	This factor depends on <u>whether the function workers perform is an integral part of the business</u>- it DOES NOT depend on *whether any individual worker in particular is* an integral part of the business.
When would this factor weigh in favor of employee classification?	When the work they perform IS critical, necessary, or central to the potential employer's <u>principal business</u>.
When would this factor wight in favor of Independent Contractor classification?	When the work performed IS NOT critical, necessary, or central to the potential employer's <u>principal business</u>.



Extent to which the work performed is an integral part of the potential employer's business.

(6) Skill and initiative

This factor considers whether the worker uses specialized skills to perform the work and whether those skills contribute to business-like initiative.

Question	Answer
When will this factor indicate employee status?	Whenever the worker DOES NOT use specialized skills in performing the work or where the worker is dependent on training from the potential employer to perform the work.
Does bringing specialized skills to the work relationship be indicative of Independence?	No. Because both employees and Independent Contractors may be skilled workers.
What would indicate Independent Contractor status?	The workers use of those specialized skills in connection with business-like initiative.

§ 795.115 Severability

How long shall this rule be enforceable?

If any provision of this part is held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed so as to continue to give the maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this part and shall not affect the remainder thereof.

Signed this 2nd day of January, 2024.
Jessica Looman, Administrator, Wage and Hour Division.

[FR Doc. 2024–00067 Filed 1–9–24; 8:45 am] BILLING CODE 4510–27–P

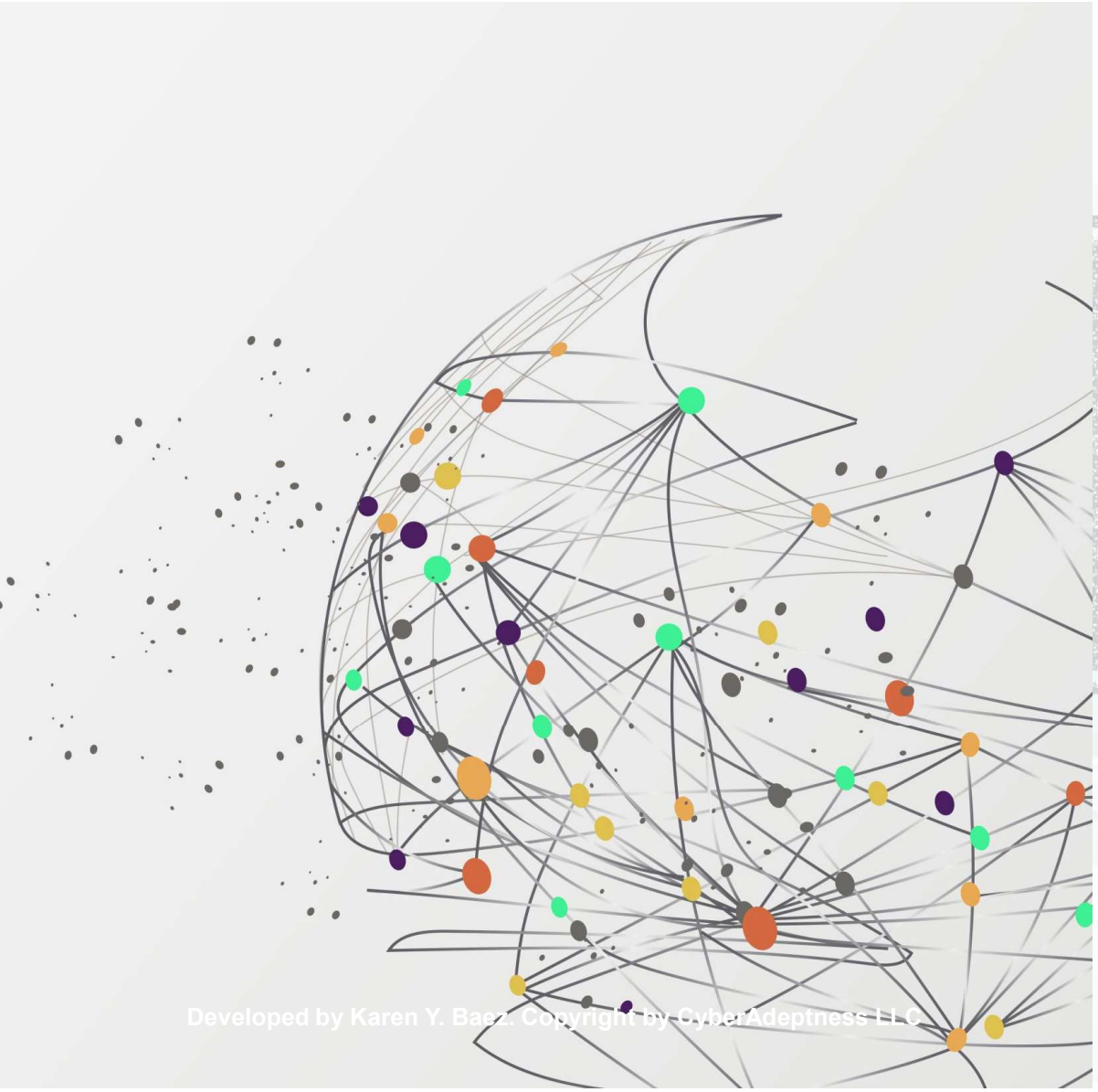
Issues to Consider

Issue 1: Estimated Time Entities are to spend familiarizing with ruling

- ❑ The timing determined by the Department of Labor is unrealistic, as the department has crammed 3-4 pages per page and even the most avid reader cannot fully focus due the amount of information packed per page. Which means that 106 pages equate to 3 or 4 times that number of pages to be reviewed.
- ❑ The structure of the document easily detracts from its purpose, as it would be bypassed or ignored by most individual who lack focus span, and those hinder the overall message from being fully understood or delivered in a proper manner.
- ❑ As an avid reader, reviewing and extracting the data from the ruling took about (1) month to process, but only after properly breaking it down in a visual manner.

RECOMMENDATION

Rulings MUST be reformatted into VISUALS and Formats that are easier to understand and easier to process. Timeframe deductions must be based on number of pages to be reviewed vs. stating that most individuals will give up reading after a set timeframe, which is basically what the department stated.



Independent Contractor Overview

Overview

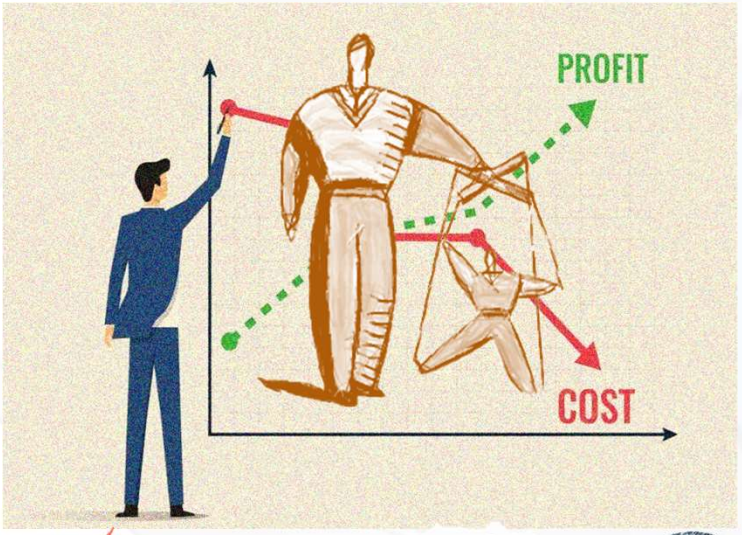
2/27/2024

Why individuals become Independent Contractors instead of Employees?

There are many reasons why an individual decides to take the Independent Contractor route. While the list noted is not exhaustive and is based on personal experiences, it provides the general reasons why many employees opt to free themselves by becoming Independent Contractors.

- **Need for a FLEXIBLE Schedule to properly have a life-work balance.**
- **Outgrowing a workplace that either turned toxic or no longer suits the soul, as the work is not appreciated**
- **The Seniority Level knowledge is best use to address collective level issues through Independence**

What aspects of a relationship impacts the Economic Reality test ?

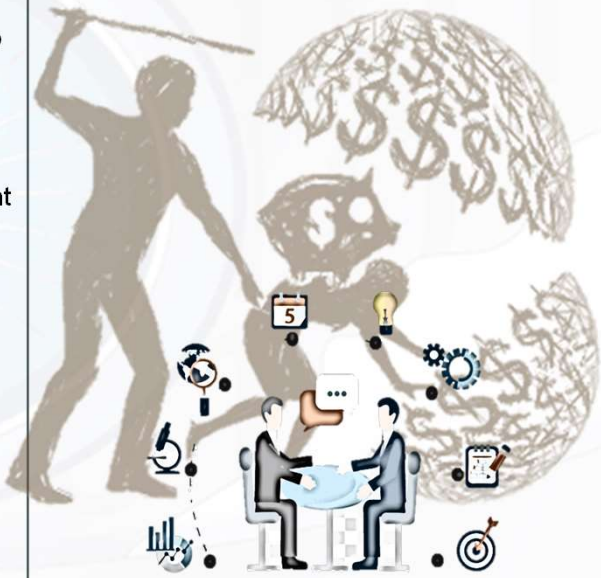


Integration

- Forced working relationships, in which the employer imposes fear on the contractor in order to excerpt their control, in specific taking legal actions if they remove themselves from the project.
- Forced work services integration, in which the employer opts to integrate the contractors work against their will into their own business with ZERO regard to the contractor's wishes.
- Forced working relationship, in which the employer opts to become vindictive against the contractor for refusing to continue a working relationship.
- Forced employment, in which the employer, despite multiple talks that one wishes to be an Independent Contractor vs. an employee, impose their will on the contractor in order to force an employer-employee relationship with the goal of stealing the contractors trade secrets and Intellectual Property – by using techniques where the contractor is downplayed through the use of salary and work manipulation in order to hold control over the contractors.

What happens when the worker's work is indeed critical but is based on a FORCED relationship?

- An IT Consultant offers Security Services to a client through a third party.
- The third party prohibits the IT Consultant from fully communicating with the investor of the third party, who is to be the client.
- The IT Consultant has no idea on what was said among the parties, but the terms were made clear to the third party via e-mail and further addressed during a face-to-face meeting.
- During the waiting period, the IT Consultant is working on the artifacts required for the services to be provided and further expanding her marketing services by creating the business website, marketing material, etc.
- The initial agreement is a verbal agreement as the company was yet to be formed, and the agreement was to be drafted once the company was in place.
- The IT Consultant is told that they will face legal consequences IF they remove themselves from the project.
- The client forces the IT Consultant to do jobs deemed out-of-scope that were not agreed upon nor properly addressed.
- Any action taken to address the issue is completely ignored and the IT Consultant is expected to provide out-of-scope services without any changes to the original agreement during the engagement.
- The IT Consultant performs the jobs because the client refuses to attain the proper resources and imposes fear on the IT Consultant.
- The work of the IT Consultant is then offered forward to the client's clientele with little or no regard to the IT Consultants stance on the subject.
- Since the employer refuses to attain proper resources, the IT Consultant's work is now integrated BY FORCE into the business and since there's no other resource as the client refuses to attain proper resources, the IT Consultant is, by this rule's definition an employee even though it was against their will.



Independent Contractor Protections NEEDED

Employment Retaliation Protections

Employment Discrimination Protections

Why do Independent Contractors need Retaliation Protection?

Since there aren't any kind of protections in place for Independent Consultants, clients tend to retaliate because there are no laws protecting Independent Contractor, so they feel free to do as they wish.

Many employers who engage Independent Consultants tend to impose their will on the consultant by …

Demoting the Consultant when they refuse to become an employee.	Refusing to adjust rate-based contract upon job duties changes.	Deliberately causing undue hardship or leveraging existing hardship to control the relationship outcome.
Refusing to recognized an otherwise qualified and deserving contractor.	Verbally Bullying and harassing consultant by talking down and alienating workers through malicious gossip.	Initiating a malicious and vindictive lawsuit full of lies to destroy the Contractor's in hopes of forcing a working relationship.
Refusing to attain proper resources and expecting contractor to fulfill multiple jobs out of scope without rate adjustment.	Deliberately making work impossible by asking the contractor to go against their Integrity and Moral Values – for contractor to disengage.	

Why do Independent Contractors need Discrimination Protection?

Currently, the Civil Acts Rights DOES NOT PROTECT Independent Consultants from being discriminated against. The Civil Right Act of 1964 protects employees from discrimination based on …

RACE	COLOR	RELIGION	NATIONAL ORIGIN	SEXUAL Orientation

The above items are no different for Independent Contractors, in fact, employers are more accustomed to discriminating against Independent Contractors simply because there are NO PROTECTIONS currently in place addressing the issues noted above.

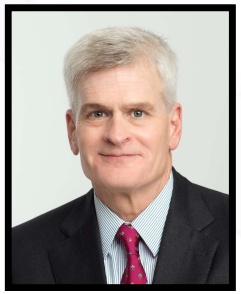
In addition, since not everyone is Religious, protections for Non-Religious Denominations should also be inclusive within the protections.

WE ALL HAVE FREE WILL TO BE FREE FROM TOXIC EMPLOYERS

Current Status

03-06-2024 > Congress Introduces a Resolution to Overturn DOL's Final Rule …

U.S. Representative
Kevin Kiley (R-CA)



U.S. Senator
Bill Cassidy, M.D. (R-LA)

U.S. Representative Kevin Kiley (R-CA), chairman of the Education and the Workforce Subcommittee on Workforce Protections, introduced *a Congressional Review Act* (CRA) resolution to overturn the Department of Labor's (DOL) final worker classification rule that threatens the gig economy and jeopardizes the ability of 27 million Americans to work as independent contractors. The rationale is that Biden's Independent Contractor Rule is confusing, cumbersome & anti-worker.

This comes as the DOL final rule was released earlier this year. U.S. Senator Bill Cassidy, M.D. (R-LA), ranking member of the Senate Health, Education, Labor, and Pensions Committee, introduced the companion CRA resolution in the U.S. Senate.

Resolution Link:
https://d12t4t5x3vyizu.cloudfront.net/kiley.house.gov/uploads/2024/03/KILEY_028_xml-2.pdf

What is *a Congressional Review Act* (CRA) Resolution and how it works?

The CRA (codified at 5 U.S.C. §§801- 808) is a tool Congress can use to overturn certain federal agency actions. The CRA was enacted as part of the Small Business Regulatory Enforcement Fairness Act in 1996.

It Applies To …

- final rules, including major rules, non-major rules, and interim final rules.
- Additionally, the definition is sufficiently broad that it may include agency actions that are not subject to traditional notice-and comment rulemaking, such as guidance documents and policy memoranda.

It Doesn't Apply To …

The CRA does not apply to presidential actions or to non-rule agency actions such as orders.

How it works?

1) The CRA requires agencies to report the issuance of "rules" to Congress and provides Congress with special procedures, in the form of a joint resolution of disapproval, under which to consider legislation to overturn rules.
2) If a CRA joint resolution of disapproval is approved by both houses of Congress and signed by the President, or if Congress successfully overrides a presidential veto, the rule at issue cannot go into effect or continue in effect.

https://crsreports.congress.gov/product/pdf/IF/IF10023

Who supports the resolution and why?

"SHRM stands in firm support of the CRA's initiative to repeal the recently published worker classification rule under the FLSA [Fair Labor Standards Act] and return to the 2021 rule,"

SHRM

Chief of Staff and Head of Public Affairs Emily M. Dickens

"We believe that the current rule fosters ambiguity, deterring businesses from extending essential training to independent workers, a detrimental scenario for both parties involved. The 2021 rule struck a balanced approach, promoting business flexibility while curbing misclassification risks."

The Society for Human Resource Management (SHRM)
https://www.shrm.org/home

References

References

- JAN 2024 DOL FINAL RULE: Employee or Independent Contractor Classification Under the Fair Labor Standards Act > https://www.federalregister.gov/documents/2024/01/10/2024-00067/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act
- 29 U.S. Code § 203- Definitions > https://www.law.cornell.edu/uscode/text/29/203
- DOL Fact Sheet 13: Employee or Independent Contractor Classification Under the Fair Labor Standards Act (FLSA)-Revised January 2024 > https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship
- Congressional Review Act (CRA): A Brief Overview - https://crsreports.congress.gov/product/pdf/IF/IF10023
- SHRM: Congress Introduces Resolution to Overturn Independent Contractor Final Fule > https://www.shrm.org/topics-tools/employment-law-compliance/resolution-independent-contractor-rule
- H.J.Res – Resolution Context - https://d12t4t5x3vyizu.cloudfront.net/kiley.house.gov/uploads/2024/03/KILEY_028_xml-2.pdf

Do you find this work useful?

If yes, you are welcome to contribute for the time spent. Your contributions will be appreciated.
In addition, feel free to submit recommendations of other rules you wish to see turned into visuals.

Karen Baez

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